This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

DL
AGL
Q119

A Gordon.
29 Clare Street
Bristol
2 Newton Buildings
Temple. June 4. 1873.

THE

MODERN LAW

OF

REAL PROPERTY.

THE

MODERN LAW

OF

REAL PROPERTY

WITH AN

INTRODUCTION

FOR THE STUDENT

AND

An Appendix

CONTAINING

THE LIMITATION ACT, 1874; THE VENDOR AND PURCHASER ACT, 1874;
THE LAND TRANSFER ACT, 1875; THE SETTLED ESTATES ACT, 1877;
THE CONVEYANCING ACTS, 1881, 1882; THE SETTLED LAND ACT, 1882;
THE MARRIED WOMEN'S PROPERTY ACT, 1882;
AND
THE RULES OF THE SUPREME COURT, 1882.

BY

LOUIS ARTHUR GOODEVE,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:
W. MAXWELL & SON, 8, BELL YARD, TEMPLE BAR,
Law Booksellers and Publishers.
MEREDITH, RAY, & LITTLER, MANCHESTER;
HODGES, FIGGIS & CO., AND E. PONSONBY, DUBLIN;
CHARLES F. MAXWELL, MELBOURNE & SYDNEY.
1883.

LONDON:
BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

PREFACE.

THE great changes effected in the Law of Real Property and in the practice of Conveyancing by the legislation of recent years, culminating in the Acts of 1881 and 1882, have suggested the publication of the present work. It has been designed specially for Students, and, accordingly, commences with an Introduction, which in the First Part explains the classifications and subjects of property—in other words, what is signified by the term Real Property, and in the Second Part briefly expounds the feudal system and its outcome in the modern tenures of English Law. Thence proceeding by steps, the aim has been gradually to unfold to the Student a comprehensive view of the Modern Law. The reasons upon which so much of the English Law of Real Property is founded being historical, and much of the present law still depending on the enactments of former centuries, a knowledge of the past is largely necessary to an understanding of the present. Hence, in tracing the principles on which the present rules of law are founded and showing their connexion with each other, it has constantly been necessary to carry the reader back to times far from modern; but it has been no part of the design to dwell on the past more than necessary for a clear and philosophical exposition of the law at the present time. The materials for this part of the work were collected and

worked up by the Author for a course of Lectures on the principles of the Law of Real Property and the practice of Conveyancing, which he was called upon to deliver in 1878—1880.

The principal modern Acts are printed in an Appendix, that the reader may have the whole text before him; and throughout the Treatise, where it has appeared of special importance or likely to be convenient, the Statutes have been quoted *verbatim*, *e.g.*, the Statute of Uses, the Act of 1877 to amend the Law as to Contingent Remainders, &c., &c. Also, to add life and value to the text, there are given *verbatim* many lucid expositions of different points of the law by eminent Judges and Writers of authority. For an example of this method the reader is referred to the last Chapter, namely, on the Statutes of Limitation: which subject in its modern aspect, it is believed, has not hitherto been so fully treated in any publication. It has been sought throughout to avoid prolixity, and to be as concise in statement as was consistent with making the text both interesting and clear; for instance, in stating and explaining the Rules of Inheritance in the fourth Chapter, it has been endeavoured to give a concise and logical statement of them, with merely short examples under each rule where illustration seemed necessary.

There are added in the Notes throughout many references to other Works, not always as necessary in support of the proposition in the text, but to indicate to the reader where to seek further information, it being impossible in such a work as the present to treat the different subjects touched upon exhaustively; for instance, Incorporeal Hereditaments. For further elucidation of the text, and that the Student may see the

application in practice of the principles enunciated, reference is constantly made in the Notes to forms in the books of Precedents in Conveyancing.

The modern Acts *ex necessitate* pervade the whole treatise, but there will be found stated the general scope of the Settled Land Act in the first Chapter, and of the Married Women's Property Act in relation to Real Property in the third Chapter.

For the use of the Practitioner the reported decisions upon the Acts in the Appendix have been noted and a few cross references given ; also the Supreme Court Rules, 1882, and the Order as to Court Fees are inserted. While the book has been specially designed for the Student, it is hoped that it may be not without use to the Practitioner also, in so far as, in addition to the Appendix of Acts, &c., it contains a correct statement of the Modern Law and reference to the authorities.

The treatise, except in the Introduction, deals only with Freeholds and Leaseholds, with which alone the Conveyancing Acts, 1881, 1882, in general deal.

The best thanks of the Author for preparing the Index are due to Mr. John C. H. Flood, of the Middle Temple, the well-known author of "Wills of Personal Property" and other books, who kindly undertook the work; thus, the efficiency of not the least important part of the book has been secured. The Author wishes that he could feel as certain that he has succeeded in his part.

L. A. G.

MIDDLE TEMPLE,
May, 1883.

CONTENTS.

INTRODUCTION.

PART I.

CLASSIFICATIONS OF PROPERTY.

	PAGE
I. PROPERTY	1
II. IMMOVABLE AND MOVABLE	2
LANDS, TENEMENTS, AND HEREDITAMENTS, GOODS AND CHATTELS	*ib.*
REAL AND PERSONAL	*ib.*
Land	4
Tenement	6
Hereditament	*ib.*
a. Corporeal, *b.* incorporeal	7
'Land' in Conveyancing Act, 1881	8
Goods and chattels	*ib.*
a. Choses in action, *b.* choses in possession	*ib.*
Chattels real	9
Trees	10
Emblements	*ib.*
Fixtures	11
Animals	13
Title-deeds	14
Mixed	*ib.*
'Property' in Conveyancing Act, 1881	15
III. DESCENT OR DISTRIBUTION OF PROPERTY	*ib.*
Lex situs—lex domicilii	*ib.*

PART II.

TENURE OF PROPERTY—FEUDAL SYSTEM.

I. PROPRIETORSHIP—TENURE	17
II. LANDED ESTATES	18
a. Allodial	*ib.*
b. Feudal	*ib.*
Benefices, fiefs or feuds	*ib.*
Subinfeudation	19

PAGE

Creation of a feud 20
Give and grant—feoffment . . . . . *ib.*
Investiture—livery of seisin . . . . . *ib.*
Fealty—homage . . . . . *ib.*
Incidents, viz. 21
(1) Relief; (2) fine; (3) scutage . . . . . *ib.*
(4) Forfeiture; (5) escheat 22
(6) Primer seisin 23
(7) Aids; (8) wardship; (9) marriage 24
Allodial changes to feudal . . . . . *ib.*
Tenements—tenants—tenure . . . . . *ib.*
Tenure *in capite* . . . . . *ib.*
Lord paramount—mesne lords . . . . . *ib.*
Feudalism introduced into England 25
Previously 'boc-land' and 'folk-land' . . . . . *ib.*
Services . . . . . *ib.*
Free—base . . . . . *ib.*
Certain—uncertain . . . . . *ib.*
III. FRANK TENEMENT—VILLENAGE 26
a. Frank tenement . . . . . *ib.*
Knight service or in chivalry . . . . . *ib.*
In free socage . . . . . *ib.*
1. Knight service 27
Proper . . . . . *ib.*
Improper—grand serjeanty . . . . . *ib.*
2. Free socage . . . . . *ib.*
Petit serjeanty . . . . . *ib.*
Burgage 28
Primogeniture . . . . . *ib.*
Gavelkind 29
b. Villenage . . . . . *ib.*
1. Pure . . . . . *ib.*
2. Villein-socage . . . . . *ib.*
Copyholds 30
Manors . . . . . *ib.*
Ancient demesne—customary freehold 32
Freeholds—copyholds—leaseholds 33
IV. SUBINFEUDATION ABOLISHED—BREAK UP OF FEUDAL SYSTEM . . . *ib.*
V. FRANKALMOIGN 35
FRANKMARRIAGE 36

CHAPTER I.

ESTATES FOR LIFE.

I. ESTATE—WHAT 38
None in personalty . . . . . *ib.*
Quantity of—duration 39
Quality of—mode of enjoyment . . . . . *ib.*
Estates in freeholds . . . . . *ib.*

PAGE

II. ESTATE FOR LIFE 39
Cestui que vie 40
Gift to A. B. 41
How created 42
Pur autre vie . . . . . *ib.*
General occupant 43
Special occupant . . . . . *ib.*
Alienation 45
Conveyance—Tortious . . . . . *ib.*
Innocent . . . . . *ib.*
Emblements 46
Apportionment of rent . . . . . *ib.*
Waste 47
a. Voluntary . . . . . *ib.*
Timber 48
b. Permissive 49
Remedy 52
c. Equitable waste—without impeachment of waste . . . . . *ib.*
Leases and Sales of Settled Estates Acts 54
Improvements 55
Settled Land Act, 1882 . . . . . *ib.*
Sales and Exchange 56
Improvements 57
Land in exchange 58
Leases . . . . . *ib.*
Protection of settled property 59
Powers under the Act cumulative, cannot be abrogated . . . . *ib.*
Heirlooms . . . . . *ib.*
Infants . . . . . *ib.*
Married women . . . . . *ib.*
Lunatics . . . . . *ib.*
Conveyance by tenant for life to give title (for benefit of creditors) . . 60
Curtesy—dower—tenant in tail after possibility of issue extinct . . . *ib.*

CHAPTER II.

ESTATES TAIL.

I. ESTATE TAIL—WHAT 61
General—qualified . . . . . *ib.*
Qualified: male, female—special 62
Duration . . . . . *ib.*
Tenant in tail after possibility of issue extinct 63
A freehold . . . . . *ib.*
Words of inheritance and procreation . . . . . *ib.*
II. HISTORICAL DEVELOPMENT 64
Conditional fee . . . . . *ib.*
Magna Charta 65
Statute *de donis* . . . . . *ib.*
Mortmain 67

PAGE

Taltarum's Case 68
Recovery . . . . . *ib.*
Fine 69
Abolition of fines and recoveries 71
Disposition by deed 72
Protector 73
Family settlement 74
Settled Land Act, 1882—Sale—Exchange 76
III. INCIDENTS . . . . . *ib.*
Committing waste . . . . . *ib.*
Leases . . . . . *ib.*
Debts 77
Forfeiture 78
IV. ESTATES *pur autre vie*—*quasi*-ENTAIL . . . . . *ib.*
V. PERSONALTY SETTLED ON TRUSTS SIMILAR TO ESTATES OF FREEHOLDS . 79
Settlement of realty by trust for sale 80

CHAPTER III.

ESTATES IN FEE SIMPLE.

I. DISTINCTION BETWEEN ESTATES FOR LIFE, IN TAIL, IN FEE . . . 81
Origin of the term 'fee' 82
Words of inheritance . . . . . *ib.*
1. Fee simple absolute; 2. Qualified or base fee; 3. Conditional fee . 84
II. (*a*) ALIENABILITY 85
Inter vivos—by deed . . . . . *ib.*
By will 87
Growth of power of alienation . . . . . *ib.*
Alienation must not contravene the general policy of the law . . 89
Mortmain 90
Corporations—ecclesiastical, lay—aggregate, sole . . . *ib.*
Statutes of Mortmain 91
Licence from the Crown 92
By statute 93
Mortmain Act 94
Gifts to superstitious uses 95
Exemptions from Mortmain Act 96
Rule against perpetuities 97
Accumulation of income (Thellusson Act) 99
Aliens 101
Debts 102
(In debtor's lifetime) . . . . . *ib.*
Of record, &c. 104
Lis pendens 105
Searches by purchaser 106
Voluntary settlements 107
(13 Eliz. c. 5) . . . . . *ib.*
(27 Eliz. c. 4) . . . . . *ib.*

PAGE
Bankruptcy Act—voluntary settlement 109
Life estate determinable on bankruptcy, &c. 110
Debts after death . . . . . *ib.*
Convicts 111
(*b*) POWER TO ALIENATE 112
Infants—lunatics . . . . . *ib.*
Trustee Acts 113
Conveyancing Act, 1881 . . . . . *ib.*
Settled Land Act, 1882 . . . . . *ib.*
Married women 114
Conveyancing Act, 1882 . . . . . *ib.*
Legal estate—equitable estate 115
Married Women's Property Act, 1882 116
Restraint on anticipation 118
Conveyancing Act, 1881 119
Settled Land Act, 1882 . . . . . *ib.*
V. & P. Act, 1874 120
Liability to engagements . . . . . *ib.*
Clergy 121
Descent . . . . . *ib*

CHAPTER IV.

DESCENT OR DEVOLUTION OF FREEHOLDS OF INHERITANCE.

I. DESCENT TO HEIRS SUBJECT TO DOWER AND CURTESY 122
a. Dower . . . . . *ib.*
Assignment of . . . . . *ib.*
One-third except in gavelkind . . . . . *ib.*
For life except in gavelkind . . . . . *ib.*
Attaches only on estates in possession . . . . . *ib.*
Not on estates held in joint tenancy 123
Only to actual wife at tenant's death and past nine years . . . *ib.*
Traitors . . . . . *ib.*
Possibility of issue inheritable . . . . . *ib.*
Right of, how defeated under the Dower Act 124
Effect of Dower Act 125
How otherwise defeated . . . . . *ib.*
Jointure . . . . . *ib.*
Equitable bar by contract 126
Old law . . . . . *ib.*
Seisin . . . . . *ib.*
Difficulty in way of defeating right . . . . . *ib.*
Power to lease 127
b. Curtesy . . . . . *ib.*
In the whole of the lands . . . . . *ib.*
Except in gavelkind . . . . . *ib.*
For life . . . . . *ib.*
Except in gavelkind . . . . . *ib.*

PAGE
In wife's separate estate 127
Valid and subsisting marriage at wife's death . . . . . *ib.*
Actual birth of issue inheritable in mother's life . . . . . *ib.*
Except in gavelkind . . . . . *ib.*
Wife need not have been legally seised 128
Estate must have been in possession . . . . . *ib.*
Power to lease . . . . . *ib.*
Powers under Settled Land Act, 1882 . . . . . *ib*
No interference with power of alienation . . . . . *ib.*
Origin . . . . . *ib.*
II. INHERITANCE . . . . . *ib.*
Heir—what 129
Posthumous children . . . . . *ib.*
Landed property originally partible equally . . . . . *ib.*
And, under feudal system, went to lineal descendants only and of the whole blood . . . . . *ib.*
One heir, except in case of females 130
Rules of descent, whence obtained . . . . . *ib.*
Rules or canons of descent . . . . . *ib.*
I. From purchaser . . . . . *ib.*
Who to be considered 'purchaser' 131
Devise to heir . . . . . *ib.*
Cases of settlement . . . . . *ib.*
Failure of heirs . . . . . *ib.*
II. To issue 132
III. Males before females 133
Eldest male—females equally . . . . . *ib.*
IV. Representation by issue of children—*per stirpes* . . . . . *ib.*
V. On failure of descendants, to nearest lineal ancestor . . . . *ib.*
VI. Preference to paternal line 134
VII. To issue of ancestor *ad infinitum*—half blood 135
III. SUCCESSION DUTY 136

CHAPTER V.

CHATTELS REAL—LEASEHOLDS.

I. CLASSIFICATION AND GENERAL CHARACTERISTICS 137
Chattels real . . . . . *ib.*
Creation—transfer . . . . . *ib.*
Devolution 138
General devise of lands . . . . . *ib.*
Possession, not seisin . . . . . *ib.*
May commence *in futuro* . . . . . *ib.*
II. ESTATE AT WILL 139
Definition . . . . . *ib.*
Creation . . . . . *ib.*
Determination . . . . . *ib.*
A yearly tenancy, or from year to year 140
Determinable by notice . . . . . *ib.*
Statute of Frauds and Act to Amend Law of Real Property 141

PAGE
Tenancy at will changed to yearly tenancy by payment of rent . . 141
Payment of rent must be in reference to yearly holding . . . . *ib.*
Tenancy at will may still be created 142
Form in yearly letting . . . . . *ib.*
Yearly tenancy not determined by assignment or death . . . . *ib.*
Waste 143
Notice under Agricultural Holdings Act . . . . . *ib.*
III. ESTATE FOR YEARS . . . . . *ib.*
Definition . . . . . *ib.*
Entry 144
Interesse termini . . . . . *ib.*
No livery . . . . . *ib.*
Statute of Frauds, and Act to Amend Law of Real Property . . . *ib.*
Limitation . . . . . *ib.*
Estoppel 145
Term . . . . . *ib.*
Certain beginning . . . . . *ib.*
Certain ending . . . . . *ib.*
Surrender 146
Merger . . . . . *ib.*
Botes—Estovers 148
Waste . . . . . *ib.*
Emblements . . . . . *ib.*
Rent and covenants . . . . . *ib.*
Assignee of the reversion 150
Covenants running with the land . . . . . *ib.*
Implied covenants for title under Conveyancing Act, 1881 . . . 152
Mortgages 153
Proviso for re-entry 154
Licence . . . . . *ib.*
Severance of reversion 155
Waiver 156
Actual . . . . . *ib.*
Implied . . . . . *ib.*
Breach of covenant to insure, &c. . . . . *ib.*
Non-payment of rent 157
Increase of rent 158
'Usual quarter-day' 159
Liability of executor, &c. . . . . *ib.*
Evidence on sale of performance of covenants 160
Under-lease . . . . . *ib.*
Evidence on sale of performance of covenants . . . . . *ib.*
Terms of years . . . . . *ib.*
Mortgage . . . . . *ib.*
To secure portions . . . . . *ib.*
Proviso for cesser and assignment of terms 161
Enlargement of residue of long term into fee simple 163
IV. ESTATE BY SUFFERANCE 164
Remedies for holding over . . . . . *ib.*

CHAPTER VI.

ESTATES ON CONDITION (INCLUDING MORTGAGES OF FREEHOLDS).

PAGE

I. CONDITIONAL ESTATE—WHAT . . . 165
Condition—Implied . . . *ib.*
Expressed . . . 166
Precedent . . . *ib.*
Subsequent . . . 167
Pure condition . . . *ib.*
Conditional limitation . . . *ib.*
Stranger taking benefit of condition . . . 170
Impossible—illegal—repugnant . . . 171
Name and arms clause . . . 173
Relief in equity . . . 174
II. MORTGAGES . . . *ib.*
What at law . . . *ib.*
Power of leasing under Conveyancing Act, 1881 . . . 177
Power of sale by mortgagor under Conveyancing Act, 1881 . . . *ib.*
What in equity . . . 178
Equity of redemption . . . *ib.*
Statutory limits . . . 179
Corresponding statutory limits to mortgagee's rights . . . *ib.*
Enforcement of equity . . . 180
Equity when gone . . . *ib.*
Notice before repayment . . . *ib.*
Equitable mortgage . . . *ib.*
Foreclosure . . . 181
Sale—under order of Court . . . *ib.*
Under mortgage deed, or statutory power . . . 182
Mortgagee entering into possession . . . 183
Receiver . . . *ib.*
Statutory power to appoint receiver . . . 184
Insurance . . . 185
Pursuing all remedies at once . . . *ib.*
Descent or devolution of equity of redemption . . . 186
On whom is the burthen of debt . . . *ib.*
(Locke-King's Act, &c.) . . . *ib.*
Alienation of equity of redemption . . . 188
1. By mortgage . . . *ib.*
Statutory protection to mortgagees . . . *ib.*
Tacking . . . 189
2. By sale . . . 191
The doctrine of *Toulmin* v. *Steere* . . . *ib.*
Consolidation . . . 193
Implied covenants for title . . . 196
Statutory forms . . . *ib.*
Reconveyance . . . 197
III. ESTATE BY STATUTE MERCHANT—STATUTE STAPLE . . . 199
BY ELEGIT . . . *ib.*

CHAPTER VII.

ESTATES IN POSSESSION—ESTATES IN EXPECTANCY.

PAGE

I. ESTATES IN POSSESSION 201
II. ESTATES IN EXPECTANCY 202
a. Reversions . . . . . *ib.*
Particular estate . . . . . *ib.*
Of freeholds . . . . . *ib.*
Chattel interest . . . . . *ib.*
Dower and curtesy 203
Alienation . . . . . *ib.*
Merger . . . . . *ib.*
Incidents 205
Fealty . . . . . *ib.*
Rent . . . . . *ib.*
Attornment 206
Distress . . . . . *ib.*
Condition of re-entry . . . . . *ib.*
Destruction 207
b. Remainders . . . . . *ib.*
How differing from reversions . . . . . *ib.*
(1.) Subject of direct creation 208
Right to enter immediately on cesser of prior interest . . *ib.*
Rule in *Shelley's Case* 209
Instances of application of rule—its effect . . . 210
(2.) Non-existence of tenure 211
Means of creating freehold estates *in futuro* . . . . . *ib.*
Dower—curtesy 213
Attornment . . . . . *ib.*
Merger . . . . . *ib.*
Production of holder of particular estate 214
(*x.*) Vested remainder . . . . . *ib.*
(*y.*) Contingent remainder . . . . . *ib.*
First recognition 215
Illustrations . . . . . *ib.*
Contingency with double aspect 216
Becomes vested . . . . . *ib.*
Two rules for creation . . . . . *ib.*
Destruction 217
Trustees to preserve 218
Alienation . . . . . *ib.*
Devise, vested or contingent 219
Period within which estate must take effect in possession 220
Doctrine of *cy près* . . . . . *ib.*
c. Executory devises 221
Alienation 222
Period within which estate must arise . . . . . *ib.*
From when period runs 223
Possible, not actual, events considered . . . . . *ib.*
—Failure of issue . . . . . *ib.*

PAGE
Limitation after an estate tail 223
Effect of remoteness 224
Example of executory devise void for remoteness . . . . *ib.*
Effect of failure of prior gift on executory devise . . . . *ib.*
Restriction on executory limitations—Conveyancing Act, 1882 . *ib.*
III. RECAPITULATION . . . . . *ib.*

CHAPTER VIII.

OWNERSHIP.

FOUR KINDS 227
I. SEVERALTY . . . . . *ib.*
II. JOINT TENANCY 228
Right of survivorship . . . . . *ib.*
Four unities 229
1. Title . . . . . *ib.*
2. Time 230
3. Interest 232
4. Possession . . . . . *ib.*
Husband and wife by entireties 233
Release to joint tenant 234
Severance . . . . . *ib.*
Partition 235
Settled Land Act, 1882 238
Accession of interest . . . . . *ib.*
Trustees . . . . . *ib.*
Covenants by and with joint tenants . . . . . *ib.*
III. COPARCENARY 239
Partition 240
Advowson (in whom right to present) . . . . . *ib.*
IV. TENANCY IN COMMON 241
Creation . . . . . *ib.*
Common law—equity . . . . . *ib.*
Form of creation by deed 242
Cross remainders . . . . . *ib.*
Partition 243
Dower . . . . . *ib.*
Curtesy . . . . . *ib.*
Covenants by and with tenants in common . . . . . *ib.*
V. JOINT TENANTS AND TENANTS IN COMMON . . . . . *ib.*
Waste . . . . . *ib.*

CHAPTER IX.

USES AND TRUSTS.

PAGE

I. THE LAW BEFORE THE STATUTE OF USES 245
Seisin—legal estate . . . . . *ib.*
Courts of Common Law . . . . . *ib.*
Court of Equity 246
High Court . . . . . *ib.*
Getting in legal estate 247
Equitable estate . . . . . *ib.*
Use 248
Origin of uses . . . . . *ib.*
Mortmain . . . . . *ib.*
Wills 249
To avoid attainder . . . . . *ib.*
Burdens of tenure . . . . . *ib.*
Contra 250
Uses how created . . . . . *ib.*
Expressly . . . . . *ib.*
By implication . . . . . *ib.*
Equity following, and not following, the law 251
Inconveniences 252
Partial remedies . . . . . *ib.*
II. STATUTE OF USES 253
Construction of statute 254
1. Applies only to one seised of real estate . . . . . *ib.*
2. And to the benefit of another 255
Yet conveyance 'unto and to the use of' grantee . . . . *ib.*
Conveyance by a man to the use of himself, &c. . . . . *ib.*
Conveyancing Act, 1881 256
3. And use co-extensive with feoffee's estate . . . . . *ib.*
Scintilla juris . . . . . *ib.*
Object of statute defeated 257
No use upon a use . . . . . *ib.*
Feoffee having active duties to perform not seised to use 259
Trusts . . . . . *ib.*
Purposes to which uses and trusts applied . . . . . *ib.*
e.g., Marriage settlement . . . . . *ib.*
Construction of trusts or 'equitable estates' 260
How far equity follows the law . . . . . *ib.*
Contingent remainders—at law, in equity . . . . . *ib.*
Trustees to preserve 261
Executory interests 262
Springing or shifting uses . . . . . *ib.*
Contingent remainders now take effect as executory interests . . *ib.*
Restriction on executory limitations 264
Creation and assignment of trusts . . . . . *ib.*
Transfer of equitable estates . . . . . *ib.*
Liability of equitable estates to debts 265
Generally . . . . . *ib.*
Crown debts . . . . . *ib.*

PAGE
Bankruptcy 265
Assets by descent 266
Present distinction between uses and trusts . . . . . *ib.*
III. TRUSTS . . . . . *ib.*
Active—passive . . . . . *ib.*
Executed—executory . . . . . *ib.*
Declared—implied 267
Trustees . . . . . *ib.*
Crown—corporation . . . . . *ib.*
Devolution or alienation of trust estate 268
Notice 269
Actual—constructive—Conveyancing Act, 1882 . . . . . *ib.*
Trustee Acts, 1850 and 1852 270
Trustees', &c., Powers Act, 1860—Conveyancing Acts, 1881 and 1882 . . 271
Trustee Relief Act, 1859 273
Forfeiture—escheat—advantage to trustee . . . . . *ib.*

CHAPTER X.

CONVEYANCES.

I. FEOFFMENT 274
Operative words 275
Writing . . . . . *ib.*
Deed 276
Livery . . . . . *ib.*
In deed . . . . . *ib.*
In law 277
Tortious operation . . . . . *ib.*
Limitation 278
II. GRANT . . . . . *ib.*
By deed . . . . . *ib.*
Attornment 279
Not operating by wrong . . . . . *ib.*
Operative words . . . . . *ib.*
Now ordinary conveyance . . . . . *ib.*
Implied warranty . . . . . *ib.*
Title . . . . . *ib.*
III. LEASE 280
Livery 281
Entry . . . . . *ib.*
In writing . . . . . *ib.*
By deed . . . . . *ib.*
Operative words . . . . . *ib.*
Title 282
IV. RELEASE . . . . . *ib.*
Operative words 283
By deed . . . . . *ib.*

PAGE
V. LEASE AND RELEASE 283
Bargain and sale . . . . . *ib.*
Statute of Uses . . . . . *ib.*
Statute of Enrolments 284
Before 4 & 5 Vict. c. 21, two deeds . . . . . *ib.*
Superseded by 8 & 9 Vict. c. 106 285
VI. CONVEYANCES, BESIDES GRANT, WHICH MAY STILL BE USED . . . *ib*
VII. CONVEYANCE OF LEASEHOLDS 286
In writing . . . . . *ib.*
Deed . . . . . *ib.*
Title . . . . . *ib.*
VIII. CONVEYANCES AT COMMON LAW 287
Under the Statute of Uses . . . . . *ib.*

CHAPTER XI.

POWERS.

I. DISTINCTION BETWEEN A POWER AND AN ESTATE 289
Power over the use 290
Power with or without an interest . . . . . *ib.*
Estate and power in same person 291
Barring dower 292
Extinguishment or merger . . . . . *ib.*
Powers of revocation 293
And new appointment 294
Special powers . . . . . *ib.*
Sale—exchange . . . . . *ib.*
Lease 295
Partition . . . . . *ib.*
Minerals—timber . . . . . *ib.*
Power over the use,—common law powers 297
Equitable powers 298
Restrictions on alienation by conveyance, not applying to appointments *ib.*
II. POWERS 299
1. Collateral . . . . . *ib.*
2. Relating to the land . . . . . *ib.*
a. Appendant . . . . . *ib.*
b. In gross . . . . . *ib.*
Extinguishment or suspension and release . . . . . *ib.*
1. Exclusive 301
2. Non-exclusive . . . . . *ib.*
III. LIKE DEALINGS WITH ESTATE, EXERCISE OF 304
Estates take effect under instrument creating the power . . . . *ib.*
Conveyance on fee-farm rent 305
Perpetuities—1. General powers; 2. Special powers . . . . . *ib.*
Excessive execution 308

PAGE
Valid appointment to persons not object of the power . . . 308
Appointment to separate use without power of anticipation . . *ib.*
Delegation of powers 309
Bankruptcy of donee. . . . . *ib.*
Judgment debts of donee 310
General power of appointment—Will . . . . . *ib.*
IV. EXECUTION OF 311
By deed 312
By will . . . . . *ib.*
Defective execution, when relieved in Equity 313
Defective execution relieved by statute in case of leases . . . 314
Lessor's covenants in leases under powers. . . . . *ib.*
POWERS OF ATTORNEY . . . . . *ib.*
Requirements for validity of exercise . . . . . *ib.*
Law of Property Amendment and Trustees Relief Act, 1859 . . 315
Conveyancing Acts, 1881, 1882 316

CHAPTER XII.

WILLS.

I. WILL—DIFFERING FROM INSTRUMENTS *inter vivos* 318
Will—testator—testament—devise—bequest . . . . . *ib.*
Codicil . . . . . *ib.*
History 319
Formalities on execution (Wills Act, 1 Vict. c. 26, s. 9) 320
Witnesses (ss. 14—17) . . . . . *ib.*
What may be devised (ss. 3, 24) 321
Who may devise (ss. 7, 8) . . . . . *ib.*
Married women (ss. 8, 24, 25) 322
Devise to a corporation 324
II. LAPSE . . . . . *ib.*
Two exceptions (ss. 32, 33) . . . . . *ib.*
RESIDUARY DEVISE (s. 25) 326
Will speaks from death (s. 24) . . . . . *ib.*
Residuary devise still specific . . . . . *ib.*
Marshalling assets (s. 24) 327
REVOCATION (ss. 18, 19, 20, and 23) . . . . . *ib.*
Loss or destruction 328
Obliteration—interlineation—alteration—(s. 21) 329
Revival (s. 22) . . . . . *ib.*
Revocation by alteration of estate (s. 19) 330
By alienation of part (s. 23) . . . . . *ib.*
III. EXECUTORS . . . . . *ib.*
Charge of debts and legacies . . . . . *ib.*
Implied charge of debts 332
Implied charge of legacies . . . . . *ib.*
How to frame will to prevent these questions 333
Probate. 334

PAGE
General devise of lands (s. 26) 337
Trust and mortgage estates . . . . . *ib.*
Execution of trust by devisee 338
Estate of trustees (ss. 30, 31) . . . . . *ib.*
IV. CONSTRUCTION OF DEVISES 340
Words of limitation—failure of issue (ss. 28, 29) . . . . . *ib.*

CHAPTER XIII.

INCORPOREAL HEREDITAMENTS.

I. INCORPOREAL HEREDITAMENTS—WHAT 343
Classifications . . . . . *ib.*
'Appendant'—'appurtenant' 344
II. TITHES AND ADVOWSONS 345
Apportionment of tithes 347
Merger of tithes . . . . . *ib.*
Land presumed subject to tithe . . . . . *ib.*
Title on sale of tithes . . . . . *ib.*
Title on sale of advowson 348
III. (*a.*) RIGHTS OF COMMON . . . . . *ib.*
Inclosure . . . . . *ib.*
Commons Act, 1876 349
(*b.*) RIGHTS OF WAY, WATER, LIGHT AND AIR 350
(*a.*) Profits *à prendre* 351
(*b.*) Easements . . . . . *ib.*
Title . . . . . *ib.*
Custom . . . . . *ib.*
Express grant 353
Statute of Uses . . . . . *ib.*
Conveyancing Act, 1881 . . . . . *ib.*
Prescription . . . . . *ib.*
Fiction of lost grant . . . . . *ib.*
Prescription Act 355
Its application—effect . . . . . *ib.*
Right to prospect, how acquired 356
Continuous and apparent easements, and easements of necessity . . *ib.*
Implied grant on severance of tenement . . . . . *ib.*
Extinguishment 358
'General words' . . . . . *ib.*
Conveyancing Act, 1881 . . . . . *ib.*
IV. RENTS 359
Rent-charge . . . . . *ib.*
Conveyancing Act, 1881 . . . . . *ib.*
Remedies . . . . . *ib.*
Redemption 360
Chief rents—quit rents . . . . . *ib.*
Annuities . . . . . *ib.*

PAGE
Fee-farm rents 363
Conveyancing Act, 1881 361
Apportionment 362
Release 363

CHAPTER XIV.

STATUTES OF LIMITATION.

PRINCIPLES OF 363
HISTORY OF . . . . . *ib.*
21 Jac. I. c. 16 . . . . . *ib.*
3 & 4 Wm. IV. c. 27 . . . . . *ib.*
Adverse possession 364
Crown . . . . . *ib.*
9 Geo. III. c. 16 . . . . . *ib.*
24 & 25 Vict. c. 62 . . . . . *ib.*
3 & 4 WM. IV. C. 27 . . . . . *ib.*
Application of . . . . . *ib.*
Rent reserved on a lease 365
3 & 4 Wm. IV. c. 42, s. 3 366
Lessor's right to recover possession . . . . . *ib.*
Mortgagee out of possession 367
7 Wm. IV. & 1 Vict. c. 28 . . . . . *ib.*
Not applying to rent-charge 368
By whom payment must be made . . . . . *ib.*
An action for foreclosure is for recovery of land . . . 370
Discontinuance of receipt of rent 375
37 & 38 VICT. C. 57 376
Twelve years . . . . . *ib.*
Future estates . . . . . *ib.*
Person entitled to particular estate out of possession . . . . . *ib.*
Disability 377
Tenant in tail . . . . . *ib.*
Mortgagee in possession 378
Money charged upon land and legacies . . . . . *ib.*
Money and legacies charged upon land, secured by express trust . . 379
Land or rent vested in trustee on express trust . . . . . *ib.*
Cestui que trust against trustee . . . . . *ib.*
36 & 37 Vict. c. 66, s. 25, § 2 . . . . . *ib.*
Concealed fraud 380
3 & 4 Wm. IV. c. 27 . . . . . *ib.*
37 & 38 Vict. c. 57 . . . . . *ib.*
Acquiescence—jurisdiction of equity 384
3 & 4 Wm. IV. c. 27 . . . . . *ib.*
37 & 38 Vict. c. 57 . . . . . *ib.*
Title extinguished . . . . . *ib.*
3 & 4 Wm. IV. c. 27 . . . . . *ib.*
37 & 38 Vict. c. 57 . . . . . *ib*

APPENDIX.

PAGE

37 & 38 Vict. c. 57 387
(Real Property Limitation Act, 1874.)
37 & 38 Vict. c. 78 392
(Vendor and Purchaser Act, 1874.)
38 & 39 Vict. c. 87 395
(Land Transfer Act, 1875.)
40 & 41 Vict. c. 18 433
(Settled Estates Act, 1877.)
44 & 45 Vict. c. 41 448
(Conveyancing and Law of Property Act, 1881.)
45 & 46 Vict. c. 39 497
(Conveyancing Act, 1882.)
45 & 46 Vict. c. 38 505
(Settled Land Act, 1882.)
45 & 46 Vict. c. 75 538
(Married Women's Property Act, 1882.)

RULES OF THE SUPREME COURT, 1882 548
(Settled Land Act) . . . . . *ib.*
(Married Women's Acknowledgments) 558
(Searches) 560
(Powers of Attorney) 561

ORDER AS TO COURT FEES 567

INDEX 571

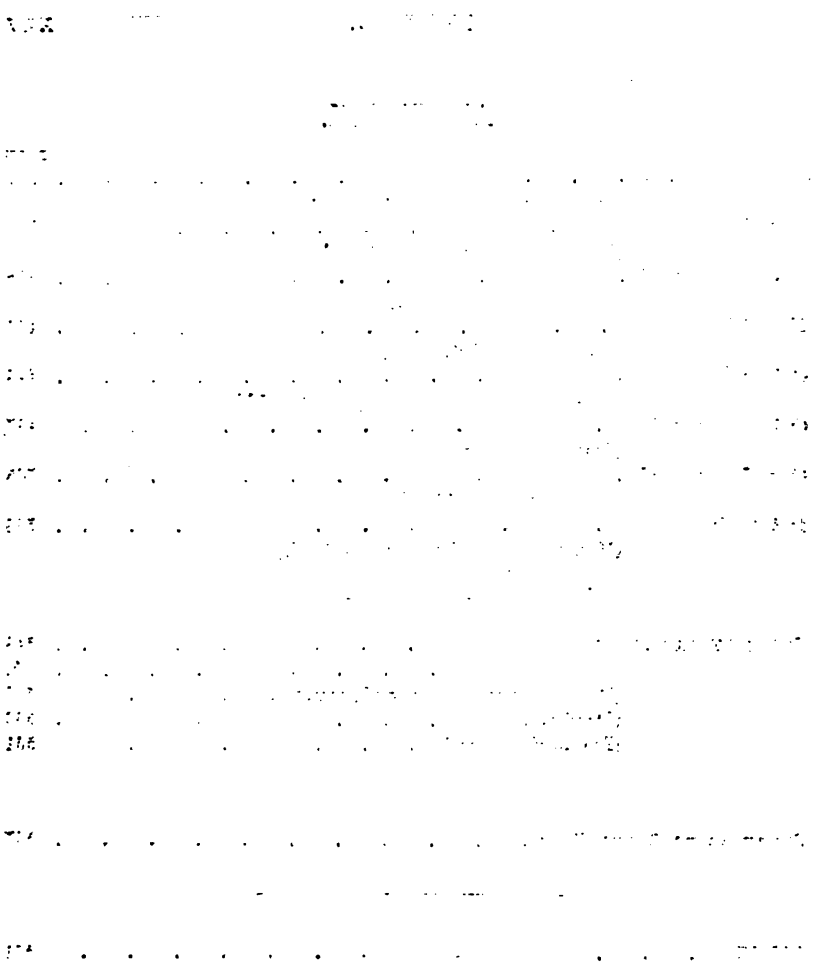

TABLE OF CASES CITED.

	PAGE
Abbis *v.* Burney	261
Adams *v.* Angell	191
— *In re*	266
Adnam *v.* The Earl of Sandwich	376
Alderson *v.* Madison	275
Alexander *v.* Alexander	308
Alison, *In re*	385
Allcock *v.* Moorhouse	142, 149
Allen *v.* Taylor	358
Anderson *v.* Pignet	162
Andrew *v.* Aitken	150
— *v.* Andrew	220
Archbold *v.* Scully	384
Ashworth *v.* Munn	14
— *v.* Outram	117
Att.-Gen. *v.* Hamilton	286
— *v.* Sands	273
Anworth *v.* Johnson	143
Backhouse *v.* Charlton	181
Bacon *v.* Smith	51
Baggett *v.* Meux	118
Baker, *In re*	384
— *v.* Sebright	52
Banbury Peerage Case	63
Barraclough *v.* Greenhough	336
Barrett *v.* Barrett	48
Beevor *v.* Such	193
Bellamy *v.* Sabine	105
— *v.* Tylden and The Metropolitan Board of Works	485
Bellis's Trusts, *In re*	307, 337
Bennett *v.* Bennett	98
Besant *v.* Wood	12, 89
Bewley *v.* Atkinson	355
Bickford *v.* Parson	149
Blake *v.* Foster	372, 373
Blewett, *In re*	74
Bligh *v.* Brent	15
Blundell's Trusts	95
Blyth *v.* Young, *In re*	394
Bolton *v.* London School Board	393
Bostock *v.* Smith	123
Boulton's Trusts, *In re*	273
Boyes *v.* Cook	311
Braddock, In the Goods of	320
Brandon *v.* Robinson	110, 118, 173
Bray *v.* Stevens	332
Braybroke *v.* Inskip	337
Bridge *v.* Yates	231
Brooke, *In re*	332
Broughton *v.* Randall	228
Brown *v.* Raindle	235
— and Sibly's Contract, *In re*	307
Buckland *v.* Butterfield	12
— *v.* Papillon	160
Buckley *v.* Howell	295
Bunnett, *Ex parte*	184
Burnett *v.* Lynch	50
Burroughs, *In re*	394
Cadell *v.* Palmer	98, 220, 221, 222, 223, 224, 505
Carter *v.* Williams	270
Casborne *v.* Scarfe	372
Chadwick *v.* Dolman	294
Chandler *v.* Pocock	311
Cheese *v.* Lovejoy	328
Chelsea Waterworks Co. *v.* New River & Avon Navigation Cos.	15
Chetham *v.* Hoare	383
Cholmeley *v.* Paxton	295, 296
Christie *v.* Ovington	268
City of London Brewery Co. *v.* Tennant	356
Clark *v.* Wright	108
Clarke *v.* Chamberlin	74
Clark's Estate, *In re*	311
Clay *v.* Tetley, *In re*	331
Clayton *v.* Blakey	141, 142
Cockell *v.* Bacon	185
Cockerell *v.* Cholmeley	296
Commissioners of Sewers *v.* Glass	352
Constable *v.* Constable	46
Cooper *v.* Woolfit	11
— *v.* Macdonald	118, 126, 127, 128
Corporation of London *v.* Riggs	351
Cripps *v.* Wood	473
Crossley *v.* Lightowler	358
Croxton *v.* May	63

	PAGE
Cummins *v.* Fletcher	195
Cunliffe *v.* Brancker	218, 263
D'Angibau, *In re*	298
Darcy *v.* Askwith	47
Davenport *v.* The Queen	156
Dawson *v.* Oliver-Massey	172
— *v.* Small	342
Denn *v.* Cartright	142
— *v.* Roake	311
— *v.* Fernside	139
Dennett *v.* Atherton	282
D'Eyncourt *v.* D'Eyncourt	7
— *v.* Gregory	59
Dickin *v.* Dickin	455
Doe *v.* Bell	141
— *v.* Dixon	133, 240
— *v.* Eyre	179
— *v.* Howell	262
— *v.* Lewis	44, 45
— *v.* Lightfoot	174, 176
— *v.* Oxenham	367
— *v.* Rollings	158, 169
— *v.* Smaridge	141, 164
— *v.* Smith	140
— *v.* Williams	367, 371, 375
Donellan *v.* Read	158
Downshire (Marquis of) *v.* Sandys	52
Dudson's Contract, *In re*	74
Dumpor's Case	154, 156
Dunstan *v.* Patterson	197
Dyke *v.* Rendall	126
Dyke's Estate, *In re*	314
Dyke, In the goods of	329
Eager *v.* Furnivall	325
East and West India Dock Co. *v.* Hill	149
Eccles *v.* Cheyne	326
Edwards *v.* Champion	79
— *v.* Slater	299
Elliott *v.* Davenport	326
— *v.* Johnson	137
Ellis *v.* Maxwell	100
Elwes *v.* Mawe	12, 13
Emanuel *v.* Constable	321
Evans, *Ex parte*	77, 265, 310
Fane *v.* Fane	7, 59
Farquharson *v.* Floyer	327
Fearnside *v.* Flint	179, 379, 391
Fleming *v.* Buchanan	310
Ford *v.* Tynte	52
Forster *v.* Patterson	390
Forth *v.* Chapman	223, 340
Foster *v.* Lister, *In re*	109
— *v.* Patterson	378
Fox *v.* Bishop of Chester	241, 347, 350
Frampton *v.* Stephens	123
Gainsford *v.* Dunn	302
Gall *v.* Fenwick	188
Gardner *v.* Sheldon	243
George *v.* Milbank	109
Gibbon's Trusts, *In re*	475
Gibbs *v.* Haydon	478
Glenorchy *v.* Bosville	267
Goodall *v.* Skerratt	378
Goodman *v.* Mayor of Saltash	352
Goodright *v.* Cator	158
Graham *v.* Jackson	314
Grant *v.* Ellis	365
Graves, *Ex parte*	112
— *v.* Weld	11
Greaves *v.* Tofield	360
Green *v.* Cole	51
— *v.* Green	342
Greville *v.* Browne	332
Griffiths *v.* Vere	101
— *v.* Gale	326
Gully *v.* Davis	138
Haigh, *Ex parte*	181
Hale *v.* Hale	99, 224
— *v.* Pew	221
Hall, *In re*	214
— *v.* Hall	293
— *v.* Doe d. Surtees	371
Hall Dare's Contract, *In re*	491
Hallen *v.* Runder	13
Hannam *v.* Mockett	14
Hanson *v.* Graham	219
Harding *v.* Glyn	264
Harlock *v.* Ashberry	368
Harrison's Settlement Trusts, *In re*	477
Harter v. Colman	194
Harvey's Estate, *In re*	310
Harvey's Settled Estates, *In re*	438
Hawkes *v.* Hubback	118
Hawkins *v.* Gathercole	121
Haywood *v.* Brunswick, &c., Building Society	150, 361
Hearle *v.* Greenbank	299
Heath *v.* Pugh	370
Hensler, *In re*	325
Henvell *v.* Whitaker	332

	PAGE
Hervey-Bathurst *v.* Stanley	262
Hiatt *v.* Hillman	163
Higinbotham *v.* Holme	110
Hoare's Settled Estates, *In re*	442
Hoare *v.* Osborne	96
Hodges *v.* Hodges	119, 309, 478
Holmes *v.* Penney	108
Honywood *v.* Honywood	48
Hooper, *Re*	273
Hopkinson *v.* Crowe	160
— *v.* Rolt	191
Hulme *v.* Tenant	118
Humphreys *v.* Green	275
Hunt *v.* Bishop	171
— *v.* Remnant	171
Hunter *v.* Nockolds	366
JAMES *v.* James	181
— *v.* Plant	358
Jaques *v.* Millar	146
Jenkins *v.* Jones	171, 219
Jenkyn *v.* Vaughan	108
Job *v.* Potton	244
Johnson *v.* Gallagher	120
Johnstone *v.* Hudleston	140
Jolly *v.* Handcock	114
Jones *v.* Jones	172
— *v.* Westcomb	224
KAY *v.* Oxley	358
Keech *v.* Hall	175-176, 371
Keeling *v.* Brown	332
Kelk *v.* Pearson	356
Kennard *v.* Kennard	314
Kenworthy *v.* Ward	231, 242
Keppell *v.* Bailey	149
Kinsman *v.* Kinsman	106
— *v.* Rouse	378, 390
Kronheim *v.* Johnson	264
LANCEFIELD *v.* Iggulden	326
Landfield, *Re*	478
Lawton *v.* Lawton	12
Leadbitter, *Re*	442
Lees *v.* Fisher	181
Le Gros *v.* Cockerell	372
Leigh *v.* Jack	376
Leman *v.* Newnham	371
Lemann's Trusts, *In re*	271
Leonino *v.* Leonino	188
Letchford, *In re*	113
Lewis *v.* Lewis	188
Liddell, *In re*	479
Lillwall's Settlement, *In re*	490
Lockhart *v.* Hardy	186
Loddington *v.* Kime	216
London and Provincial Bank *v.* Bogle	118
London and S.-W. Ry. Co. *v.* Gomm	150
Luker *v.* Dennis	149, 150
Lushington *v.* Boldero	52
MACHU, *In re*	178
Mannox *v.* Greener	341
Marsh *v.* Lee	189, 190, 191, 193
Marshall *v.* Berridge	146
Massy *v.* Rowen	118
Maundrell *v.* Maundrell	292
Mayor of Swansea *v.* Thomas	155
Mellick *v.* President, &c., of the Asylum	95
Melling *v.* Leak	139
Miles *v.* Harford	79, 267
Mills *v.* Jennings	194
Milner's Estate, *In re*	63
Moase *v.* White	138
Moreton *v.* Holt	104
Morgan *v.* Davies	140
— *v.* Earl of Abergavenny	14
— *v.* Swansea Urban Sanitary Authority	268
Morley *v.* Bird	228, 229, 230, 234, 241, 242
— *v.* Rennoldson	172
Morrell *v.* Morrell	320
Morret *v.* Paske	190
Morton and Hallet, *In re*	337
— *v.* Woods	184
Moss *v.* Gallimore	371
Mulliner *v.* Mid. Ry. Co.	84
Murray *v.* Hall	233
NELSON *v.* Hopkins	138
— *v.* Page	188
Nepean *v.* Doe	364
N. E. Ry. Co. *v.* Local Bd. of Leadgate	15
Neve *v.* Pennell	193
Newman *v.* Rusham	108
Newmarch, *Re*	188
Nickells *v.* Atherstone	146
Norman *v.* Kynaston	319
OATES d. Hatterley *v.* Jackson	231
Osborne to Rowlett	337
Ottley *v.* Manning	108
Owen, *In re*	214

	PAGE
Owens *v.* Dickenson	121
— *Re*	478
PAGET *v.* Foley	366
Partridge *v.* Bere	371
Patching *v.* Ball	455
Patman *v.* Harland	150, 270, 282, 392
Peacock *v.* Burt	190
Pearks *v.* Moseley	99, 224
Pearson, *In re*	108, 110, 173
— *v.* Spencer	357
Petre *v.* Petre	379, 380
Phillips *v.* Henson	206
— *v.* Smith	47, 48
Pike *v.* Fitzgibbon	120, 121
Pinède's Settlement, *In re*	311
Pinhorn *v.* Souster	140, 142
Porter *v.* Drew	282
— *v.* Lopes	236
Price *v.* Jenkins	109
Pugh *v.* Arton	12
Pyer *v.* Carter	357
QUEEN *v.* Chorley	358
— *v.* L. & N. W. Ry. Co.	15
— *v.* Midland Ry. Co.	15
Quilter *v.* Mapleson	465
RAGGETT, *In re*	196
Reeve *v.* Long	129, 215
Renals *v.* Cowlishaw	150, 151
Rennel *v.* Bishop of Lincoln	347
Reynolds *v.* Wright	45
Rhodes *v.* Rhodes	320
Richard *v.* Robson	95
Richardson *v.* Langridge	142
Ridler, *In re*	109
Ridley, *In re*	309
Robertson *v.* Norris	115
Robinson *v.* Ommanney	327
— *v.* Pickering	121
— *v.* Wheelwright	119
Rose *v.* Bartlett	138
Ruck *v.* Barwise	232
Rumsey *v.* Dumergue	12
Russell, *In re*	321, 326
SACKVILLE *v.* Smyth	188
Saffron Walden Building Society *v.* Rayner	191
Sanders *v.* Sanders	385
Sands to Thompson	379, 385, 388
Scaltock *v.* Harston	150, 207
Scarsdale (Lord) *v.* Curzon	79
Selby *v.* Pomfret	193
Shaw *v.* Rhodes	101
Shirreff *v.* Hastings	111
Shuttleworth *v.* Le Fleming	355
Silberschildt *v.* Schiott	372
Silk *v.* Prime	330
Sill *v.* Worswich	16
Smart *v.* Sanders	314
Smith *v.* Death	300
— *v.* Tebbitt	112, 322
Sotheran *v.* Dening	310
Spencer's Case	150
Spradbury's Mortgage, *In re*	199
Standen *v.* Christmas	149, 170, 206
Stedman, In the Goods of	329
Stephens *v.* Bridges	147
Stockton Iron Furnace Co., *In re*	184
Stone *v.* Greening	138
— *v.* Parker	186
Sugden *v.* Lord St. Leonards	329
Sury *v.* Pigot	350, 351, 356, 358
Sutton *v.* Sutton	179, 379, 391
Swansea Bank *v.* Thomas	46
TALTARUM'S CASE	68
Tamplin *v.* Miller	478
Tanqueray, Willaume and Landau, *In re*	331
Tassell *v.* Smith	194
Taylor *v.* Meads	116, 313
Teasdale *v.* Braithwaite	86, 109
Teevan *v.* Smith	197, 466
Thellusson *v.* Woodford	100
Thomas *v.* Hayward	150
— *v.* Jones	322
— *v.* Sylvester	361
— *v.* Williams	536
Thomas's Settlement, *In re*	478
Thorpe *v.* Bestwick	321
Threlfall, *Re*	184
Thring *v.* Salter	220
Tierney *v.* Wood	264
Tiverton Market Act, *In re*	228
Tomkins *v.* Colthurst	327
Tooker *v.* Annesley	48
Toulmin *v.* Steere	191, 192
Trestrail *v.* Macon	188
Tulk *v.* Moxhay	151
Tullett *v.* Armstrong	118
Turner *v.* Cameron	12
— *v.* Morgan	238
— *v.* Turner	138

	PAGE
Tussaud's Estate, *In re*	119
Twort *v.* Twort	244
Twyne's Case	107
Tyrrell's Case	245, 248, 253, 258, 264
Tyrringham's Case	345, 348, 349, 352, 358
Union Bank of London *v.* Ingram	182, 473
Union Banking Company *v.* Artly	181
Vane *v.* Vane	364, 380
Veale's Trusts, *In re*	304
Viner *v.* Vaughan	47
Vint *v.* Padget	194
Voisey, *Ex parte*	184
Wade *v.* Nelson	473
Wainford *v.* Heyl	120
Wall *v.* Byrne	45
Walsh *v.* Bishop of London	347
Walters *v.* Walters	334
Ward *v.* Ward	230, 231
Warner's Settled Estates, *In re*	439
Warwick *v.* Queen's College	356
Weatherall *v.* Thornburgh	100
West *v.* Berney	299, 300
Westbrooke *v.* Blythe	104
Weston *v.* Davidson	182, 473
— *v.* Managers of Metropolitan Asylum District	159
Wheeldon *v.* Burroughs	357
Wheelwright *v.* Walker	525, 527
White *v.* Parnther	363
Widdow's Trusts, *In re*	63
Wilcox *v.* Smith	136
Wilkes' Estate, *In re*	58
Wilkinson *v.* Calvert	143
Wilson *v.* Eden	138
— *v.* Wilson	101
Wombwell *v.* Belasyse	52
Wood *v.* Beard	141
— *v.* Dixie	107
Woodhouse *v.* Walker	50, 148
Woodroffe *v.* Doe d. Daniell	233
Woodward *v.* Dowse	123
Woolley *v.* Colman	182, 473
Wormsley's Estate, *In re*	187
Wortley *v.* Birkhead	189, 190
Wright *v.* Burroughes	170
Wrixon *v.* Vise	373, 374, 375
Wyllie *v.* Pollen	190
Zouch (Lord) *v.* Dalbiac	31

*** *The references throughout are to the latest editions of Davidson's Precedents in Conveyancing; the eleventh edition of Davidson's Concise Precedents; the twelfth edition of Prideaux's Precedents; and the eleventh edition of Williams on Real Property.*

TABLE OF STATUTES CITED.

PAGE

17 John (Magna Charta) 112
9 Hen. III. (Magna Charta) 24, 65, 92
52 Hen. III. c. 23 (Statute of Marlbridge—Waste) 50, 51
3 Ed. I. c. 39 (Westminster 1st—Prescription) 354
6 Ed. I. c. 5 (Statute of Gloucester—Waste) 50, 51
7 Ed. I. st. 2 (*De Viris Religiosis*) 92
13 Ed. I. c. 1 (Westminster 2nd—*De Donis Conditionalibus*) 65, 71, 72, 85, 204, 257
c. 18 (Westminster 2nd—Execution) 103, 200
c. 22 (Westminster 2nd—Waste) 51
c. 32 (Westminster 2nd—Mortmain) 67, 243
c. 34 (Westminster 2nd—Dower) 123
(*De Mercatoribus*) 200
18 Ed. I c. 1 (*Quia Emptores*) 34, 36, 40, 82, 87, 88, 93, 361
(Fines) 70
27 Ed. I. st. 2 (Mortmain) 92
34 Ed. I. c. 16 (Fines) 70
27 Ed. III. c. 9 (Staple) 200
15 Rich. II. c. 5 (Mortmain) 92, 249
18 Hen. VI. (Homage) 20
1 Rich. III. c. 7 (Fines) 71
4 Hen. VII. c. 24 (Fines) 71, 169
19 Hen. VII. c. 15 (Debts) 265
23 Hen. VIII. c. 6 (Recognisances) 200
c. 10 (Superstitious Uses) 95
27 Hen. VIII. c. 10 (Statute of Uses) . 45, 88, 125, 221, 252, 283, 284, 285, 286, 287, 289, 294, 297, 319
(Preamble) 253
s. 1 . . . . . 253, 254, 255, 259, 260, 276, 353
s. 4 360
s. 5 360
c. 16 (Enrolments) 284
31 Hen. VIII. c. 1 (Partition) 235, 239, 240
32 Hen. VIII. c. 1 (Wills) 33, 40, 89, 249, 289, 319, 320, 324
c. 9 (Champerty), s. 2 219
c. 28 (Leases) 76
c. 32 (Partition) 235, 239, 240
c. 34 (Covenant) 170, 206
s. 2 149
c. 36 (Fines) 71
33 Hen. VIII. c. 39 (Crown Debts) 77, 105
34 & 35 Hen. VIII. c. 5 (Wills) 89, 115, 320
s. 5 324
1 Ed. VI. c. 14 (Superstitious Uses) 95
5 & 6 Ed. VI. c. 11 (Forfeiture for Treason) 123

PAGE

13 Eliz. c. 4 (Crown Debts) 105
c. 5 (Defrauding Creditors) 107, 110
27 Eliz. c. 4 (Defrauding Purchasers) 107, 108, 109
29 Eliz. c. 5 (Defrauding Creditors) 107
31 Eliz. c. 2 (Fines) 70
c. 6 (Simony) 347
39 Eliz. c. 18 (Defrauding Purchasers) 107
43 Eliz. c. 4 (Charities) 95
21 Jac. I. c. 16 (Limitations) 371
s. 1 363
12 Car. II. c. 24 (Abolition of Knight's Service) . . 2, 26, 27, 29, 34, 35, 89, 320
22 & 23 Car. II. c. 3 (Distribution), s. 25 37
29 Car. II. c. 3 (Statute of Frauds) 205, 284
s. 1 . . . . . 85, 139, 141, 275, 281
s. 2 . . . . . 139, 141, 281
s. 3 . . . . . 275, 286
s. 4 . . . . . 181, 275
s. 5 . . . . . 89, 320, 321
ss. 7—9 264
s. 10 . . . . . 265, 266
s. 12 . . . . . 40, 44
1 Wm. & Mary, c. 2 (Power of Crown) 93
c. 16 (Benefices) 347
3 Wm. & Mary, c. 14 (Debts) 333
4 & 5 Wm. & Mary, c. 16 (Clandestine Mortgages) 188, 189
7 & 8 Wm. III. c. 37 (Mortmain) 93
10 & 11 Wm. III. c. 16 (Posthumous Children) 129, 215
4 Anne, c. 16 (Attornment) 206, 213, 278
ss. 9, 10 150
s. 27 244
6 Anne, c. 18 (*cestui que vie*) 45, 213
12 Anne, c. 12 (Simony) 347
4 Geo. II. c. 28 (Landlord and Tenant) 164, 207, 359, 360
7 Geo. II. c. 20 (Mortgage) 197
c. 21 (Limitations) 371
9 Geo. II. c. 36 (Charities—Mortmain Act) 52, 94, 95
11 Geo. II. c. 19 (Landlord and Tenant) 46, 164
s. 11 206
9 Geo. III. c. 16 (Crown Limitation) 364
39 & 40 Geo. III. c. 98 (Accumulations—Thellusson Act) 99, 100
41 Geo. III. c. 109 (Inclosure) 349
47 Geo. III. c. 74 (Debts) 333
~~4 Geo. IV. c. 28 (Distress)~~ . . . . . ~~359~~
9 Geo. IV. c. 85 (Charities) 94, 95
11 Geo. IV. & 1 Wm. IV. c. 46 (Illusory Appointments)
s. 1 302
c. 47 (Debts) 111
s. 11 112
c. 65 (Debts) 113
s. 12 112
s. 16 112
s. 31 112
2 & 3 Wm. IV. c. 71 (Prescription) 352, 356

PAGE

2 & 3 Wm. IV. c. 71 (Prescription)
Preamble 355
ss. 1, 2 . . . . . 352, 355
ss. 3, 4, 6 355
3 & 4 Wm. IV. c. 27 (Limitations) 363, 371, 373
s. 1 . . . . . 364, 368
s. 2 . . . . . 179, 364, 367, 369, 370, 374, 376
s. 3 . . . . . 365, 366, 367, 374, 375, 376
s. 5 377
s. 12 233
s. 14 367
ss. 16—18 377
ss. 21, 22 378
s. 23 377
s. 24 . . . . . 364, 367, 374, 375
s. 25 379
s. 26 380
s. 27 384
s. 28 . . . . . 178, 378
s. 29 364
ss. 30—33 . . . . . 348, 364
s. 34 . . . . . 364, 374, 375, 384, 385
s. 36 . . . . . 3, 51, 52, 235, 361
s. 40 . . . . . ~~42, 366~~, 367, 378
c. 42 (Limitations), s. 2 51
s. 3 366
c. 74 (Fines and Recoveries) 71, 79, 101
s. 15 . . . . . 63, 72
ss. 16—18 72
s. 22 74
s. 31 268
ss. 32, 38, 39 73
s. 40 . . . . . 72, 76, 265
s. 41 . . . . . 63, 72, 76
ss. 42—46 74
ss. 56—73 78
s. 74 73
ss. 77, 79, 80 . . . . . 114, 128
s. 86 114
c. 104 (Debts) 111, 310, 334
c. 105 (Dower) 125, 126
ss. 2, 3 123
ss. 4—7, 9 124
s. 14 292
c. 106 (Inheritance) 62, 129
s. 1 . . . . . 130, 131, 132, 133
s. 2 . . . . . 129, 130, 131, 132
s. 3 . . . . . 131, 132
s. 4 . . . . . 131, 132, 215
s. 6 . . . . . 133, 134
ss. 7, 8 . . . . . 134, 135
s. 9 . . . . . 135, 136
6 & 7 Wm. IV. c. 71 (Tithes) 345

PAGE

6 & 7 Wm. IV. c. 71 (Tithes)
s. 58 347
7 Wm. IV. & 1 Vict. c. 28 (Limitations) 367, 368, 370
c. 69 (Tithes) 345
1 Vict. c. 26 (Wills) 89, 115, 313, 372
s. 1 319
s. 3 . . . . . 44, 171, 206, 219, 222, 321
s. 6 . . . . . 42, 43, 44
s. 7 . . . . . 112, 321, 323
s. 8 . . . . . 115, 321, 322, 323
s. 9 320
s. 10 312
ss. 14—17 . . . . . 320, 321
s. 18 . . . . . 327, 328
s. 19 . . . . . 327, 330
s. 20 327
ss. 21, 22 329
s. 23 . . . . . 327, 330
s. 24 . . . . . 236, 321, 322, 324
s. 25 . . . . . 322, 326
s. 26 . . . . . 138, 337
s. 27 . . . . . 310, 311, 322, 324, 326
s. 28 . . . . . 42, 82, 83, 340, 341
s. 29 . . . . . 223, 340, 341
ss. 30, 31 . . . . . 338, 339, 340
ss. 32, 33 . . . . . 324, 325
c. 28 (Limitations) 179, 369, 371, 373, 374, 375
c. 64 (Tithes) 345
1 & 2 Vict. c. 110 (Debts) 103, 200, 265
s. 11 77
s. 13 . . . . . 77, 103
s. 18 . . . . . 77, 103, 310
s. 19 77
s. 22 104
2 Vict. c. 11 (Purchasers' Protection) 103
s. 7 106
2 & 3 Vict. c. 60 (Debts) 60, 112
c. 62 (Tithes) 345
3 & 4 Vict. c. 15 (Tithes) 345
4 & 5 Vict. c. 21 (Lease and Release) 284, 285
c. 38 (School Sites) 96
5 & 6 Vict. c. 54 (Tithes) 345
7 & 8 Vict. c. 37 (Education of the Poor, &c.) 96
c. 76 (Transfer of Property)
s. 8 251
8 & 9 Vict. c. 18 (Lands Clauses)
s. 74 58
s. 81 86
ss. 115—118 362
s. 132 279
c. 20 (Railways Clauses)
s. 77 6
c. 56 (Drainage) 55

PAGE

8 & 9 Vict. c. 106 (Real Property Amendment) 203
s. 2 . . . . . 86, 279, 281, 285
s. 3 . . . . . 86, 137, 141, 144, 146, 236, 276, 281, 286
s. 4 . . . . . 22, 45, 277, 279
s. 6 . . . . . 171, 206, 219, 222
s. 8 . . . . . 217, 251, 262
s. 9 207
c. 112 (Satisfied Terms) 161
c. 118 (Inclosure) 236, 349
c. 119 (Real Property Amendment) 86
9 & 10 Vict. c. 73 (Tithes) 345
10 & 11 Vict. c. 11 (Drainage of Lands) 55
c. 70 (Fines) 71
c. 87 (Debts) 60, 112
c. 104 (Tithes) 345
c. 119 (Drainage) 55
12 & 13 Vict. c. 26, and c. 110 (Leases) 314
c. 49 (School Sites) 96
c. 67 (Sequestration of Ecclesiastical benefices) 121
13 Vict. c. 17 (Leases) 314
c. 21 (Acts of Parliament Abbreviation)
s. 4 . . . . . 6, 487
13 & 14 Vict. c. 31 (Drainage) 55
c. 60 (Trustees)
ss. 3, 4 . . . . . 113, 270
s. 7 270
ss. 8—14 270
ss. 15—18 271
s. 20 271
ss. 32—34 271
ss. 46, 47 273
s. 78 113
14 & 15 Vict. c. 24 (School Sites) 96
c. 25 (Landlord and Tenant) 11, 46
s. 2 149
s. 3 13
15 & 16 Vict. c. 24 (Wills) 89, 320
c. 49 (School Sites) 96
c. 55 (Trustees) 113
ss. 2, 8, 9 271
s. 11 . . . . . 270, 271
c. 76 (Common Law Procedure)
s. 24 40
s. 210 . . . . . 157, 158
s. 212 157
c. 86 (Chancery Practice)
s. 48 181
16 & 17 Vict. c. 51 (Succession Duty) 136
c. 70 (Idiots and Lunatics) 112
c. 137 (Charitable Trusts) 93
s. 50 268
17 & 18 Vict. c. 97 (Inclosure)
s. 10 362

PAGE

17 & 18 Vict. c. 97 (Inclosure)
s. 14 362
c. 112 (Literary and Scientific Institutions) 96
c. 113 (Mortgage Debts) 186
c. 125 (Common Law Procedure)
s. 26 336
s. 78 3
18 Vict. c. 15 (Purchasers' Protection)
ss. 12, 14 360
18 & 19 Vict. c. 13 (Idiots and Lunatics) 112
c. 15 (Judgments)
s. 2 104
s. 7 . . . . . 104, 297
c. 43 (Infants' Marriage) 298
ss. 1, 2 298
c. 124 (Charitable Trusts) 93
s. 35 93
19 & 20 Vict. c. 9 (Drainage) 55
c. 108 (County Courts)
s. 49 104
s. 73 . . . . . 114, 128
c. 120 (Settled Estates) 54
s. 11 . . . . . 49, 54
s. 15 76
s. 32 . . . . . 54, 76, 127
s. 35 76
s. 42 76
s. 44 54
s. 46 54
20 & 21 Vict. c. 77 (Probate)
ss. 61, 62 334
s. 63 335
s. 64 . . . . . 335, 336
22 Vict. c. 27 (Recreation Grounds) 96
22 & 23 Vict. c. 35 (Law of Property and Trustees)
ss. 1—3 154
ss. 4—9 156
s. 10 362
s. 12 312
s. 13 296
ss. 14—18 . . . . . 111, 330, 331, 332
s. 19 . . . . . 62, 81, 129, 131, 132
s. 20 . . . . . 62, 129
s. 21 256
ss. 24, 25 189
s. 26 315
s. 27 159
s. 30 273
23 & 24 Vict. Law of Property)
s. 4 189
s. 6 156
s. 7 257
s. 8 189

PAGE

23 & 24 Vict. c. 38 (Law of Property)
s. 9 273
c. 93 (Tithes) 345
c. 126 (Common Law Procedure) 3
s. 1 158
s. 2 156
c. 136 (Charitable Trusts) 93
c. 145 (Trustees' and Mortgagees' Powers) 7
Pts. I. and IV. . 55, 295
Pt. II. . . 182, 184, 185
ss. 1, 2 272
s. 15 163
ss. 27, 28 271
s. 29 272
s. 31 271
s. 32 . . . . . 55, 182
24 Vict. c. 9 (Charities) 94
s. 3 95
s. 4 95
24 & 25 Vict. c. 62 (Crown Limitations) 364
25 Vict. c. 17 (Charities) 95
25 & 26 Vict. c. 53 (Land Transfer) 87
c. 86 (Idiots and Lunatics) 112
c. 89 (Companies)
ss. 18, 21, 191 93
c. 108 (Confirmation of Sales)
ss. 1, 2 296
c. 112 (Charitable Trusts) 93
26 & 27 Vict. c. 106 (Charities) 95
27 Vict. c. 13 (Charities) 95
s. 4 94
27 & 28 Vict. c. 45 (Settled Estates) 54
c. 112 (Debts) 77, 265, 310
s. 1 103
s. 3 104
c. 114 (Improvement of Land) 55
s. 9 58
28 & 29 Vict. c. 99 (County Courts)
s. 1, § 1 111
s. 1, § 5 . . . . . 271, 273
s. 10 273
s. 10, § 3 111
c. 104 (Crown Suits) 78
s. 48 . . . . . 78, 105, 265
s. 49 105
29 & 30 Vict. c. 57 (Charities) 95
30 & 31 Vict. c. 47, s. 2 106
c. 69 (Mortgage Debts) 187
c. 142 (County Courts)
s. 11 236
31 & 32 Vict. c. 40 (Partition) 236
ss. 3, 4, 12 236
c. 44 (Religious, &c., Buildings Sites) 96

PAGE

31 & 32 Vict. c. 44 (Religious, &c., Buildings Sites)
s. 3 94
c. 54 (Judgments) 103
c. 89 (Tithes) 345
32 & 33 Vict. c. 46 (Debts) 110, 111
c. 71 (Bankruptcy)
s. 14 309
s. 15 103
s. 15, § 1 266
s. 15, § 4 309
s. 17 309
s. 25, § 4 78
s. 25, § 5 310
s. 40 111
s. 91 . . . . . 107, 109
s. 117 266
c. 110 (Charity Commissioners) 93
33 Vict. c. 14 (Naturalisation) 101
s. 2 102
33 & 34 Vict. c. 23 (Forfeiture for Treason) 78, 123
s. 1 . . . . . 23, 112
s. 8 112
c. 34 (Charitable Trusts) 93
c. 35 (Apportionment)
ss. 2, 7 46
c. 93 (Married Women's Property) 116
s. 8 116
s. 9 117
c. 102 (Naturalisation) 101
34 Vict. c. 13 (Public Parks, Schools, and Museums) 96
34 & 35 Vict. c. 45 (Sequestration of Ecclesiastical Benefices) 121
c. 84 (Limited Owners' Residences) 55
35 & 36 Vict. c. 24 (Charitable Trustees Incorporation) 93
c. 24 (Charities)
s. 13 95
c. 39 (Naturalisation) 101
36 & 37 Vict. c. 50 (Places of Worship Sites) 97
c. 66 (Judicature)
s. 16 . . . . . 104, 236
ss. 24, 25 . . . . . 247, 373
s. 25, § 2 379
s. 25, § 3 52
s. 25, § 4 148
s. 25, § 5 . . . . . 174, 371
s. 25, § 6 9
s. 25, § 11 . . . . . 52, 246
s. 34 . . . . . 236, 336
s. 34, § 3 . . . . . 113, 180, 244, 270, 273, 296
s. 89 246
37 & 38 Vict. c. 33 (Settled Estates) 55
c. 37 (Contingent Remainders)
s. 1 303
s. 2 303

PAGE

37 & 38 Vict. c. 50 (Married Women's Property) 116
c. 57 (Real Property Limitation) 387
s. 1 . . . . . 364, 376
s. 2—6 377
s. 7 . . . . . 179, 378
s. 8 . . . . . 179, 367, 378
s. 9 . . . . . 179, 364, 367, 368, 378, 380, 384, 385
s. 12 368
c. 78 (Vendor and Purchaser) 392
s. 1 . . . . . 280, 348
s. 2 282
s. 2, § 1 287
s. 4 199
s. 5 268
s. 6 . . . . . 120, 268
c. 87 (Endowed Schools Amendment) 93
38 & 39 Vict. c. 55 (Public Health) 93
c. 77 (Judicature)
s. 7 . . . . . 113, 270
s. 10 111
(Rules) 72, 95, 106
c. 87 (Land Transfer) 395
s. 4 . . . . . 6, 87
s. 29 87
s. 48 268
s. 111 87
s. 127 104
c. 92 (Agricultural Holdings) 13
s. 51 143
s. 54 143
s. 60 143
39 & 40 Vict. c. 17 (Partition) 236
c. 30 (Settled Estates) 55
c. 56 (Commons) 349, 350
40 & 41 Vict. c. 18 (Settled Estates) 433
s. 2 . . . . . 54, 60, 63
ss. 3 & 4 54
s. 16 . . . . . 49, 54, 296
. 59
19 296
. . . . . 49, 76, 77
24 76
s. 34 49
s. 37 58
s. 38 54
s. 46 . . . . . 54, 76, 77, 127, 128
s. 55 . . . . . 76, 77
s. 57 54
s. 58 54
c. 33 (Contingent Remainders) 218, 251, 262, 263
c. 34 (Mortgage Debts) 187
41 & 42 Vict. c. 42 (Tithes) 345
44 & 45 Vict. c. 41 (Conveyancing and Law of Property) 448

		PAGE
44 & 45 Vict. c. 41 (Conveyancing and Law of Property)		
	s. 1	64, 83
	s. 2	198
	s. 2 (i.)	15
	s. 2 (ii.)	6, 8
	s. 2 (iv.)	31
	s. 2 (v.)	86, 153
	s. 2 (vi.)	196
	s. 2 (vii.)	177
	s. 2 (viii.)	316
	s. 2 (xviii.)	119
	s. 3 (1)	282
	s. 3 (4)	160
	s. 3 (5)	160
	s. 4	316
	s. 5	177, 197
	s. 6	358
	s. 7	239, 280
	s. 7 (1) (A.) (B.)	152
	s. 7 (1) (A.) (F.)	280
	s. 7 (1) (B.)	287
	s. 7 (1) (C.)	176, 196
	s. 7 (1) (C.) (D.)	153
	s. 7 (1) (2) (7)	55
	s. 7 (5)	33
	s. 7 (6)	153
	s. 10	151, 156, 171, 177, 206
	s. 11	152, 156, 177, 314
	s. 12	155
	s. 13	282
	s. 14	362
	s. 14 (6) (i.) (ii.)	157
	s. 14 (7)	156
	s. 14 (8)	157
	s. 15	197
	s. 15 (2)	199
	s. 17	196
	s. 18	177
	s. 18 (11), (17)	177
	s. 18 (12), (17)	177
	s. 18 (13), (14)	177
	s. 18 (16)	174, 177
	ss. 19—22	183
	s. 19	185, 298
	s. 19 (1), (iv.)	183
	s. 19 (2)	183
	s. 20	298
	s. 20 (i.)	180
	s. 21	163, 298
	s. 23	185
	s. 24	185
	s. 25	181
	s. 25 (1), (2), (3), (6)	182

PAGE

44 & 45 Vict. c. 41 (Conveyancing and Law of Property)
ss. 26—29 197
s. 30 . . . . . 178, 199, 268, 298, 337, 338
ss. 31—34 272
s. 35 . . . . . 272, 330
s. 36 . . . . . 273, 330
s. 38 . . . . . 331, 338
s. 39 . . . . . 119, 309
s. 40 316
ss. 41—43 113
s. 44 359
s. 45 360
ss. 46—48 316
s. 49 . . . . . 86, 279, 285
s. 50 256
s. 51 . . . . . 41, 64, 83, 234, 242, 278
s. 52 301
s. 57 86
s. 58 . . . . . 151, 361
s. 58 (1) 45
s. 59 . . . . . 110, 111, 151
s. 60 . . . . . 152, 239
s. 62 353
s. 64 239
s. 65 163
s. 65 (4) 164
s. 71 . . . . . 182, 185, 272, 273
s. 71 (2) 199, 269
2nd Sched. pt. ii. 156, 181
3rd Sched. 197
4th Sched. 64, 86
45 & 46 Vict. c. 38 (Settled Land) 505
s. 1 . . . . . 49, 55
s. 2 (5), (6), (7) 49, 56
s. 2 (10) (i.) 6
s. 3 56
s. 3 (iv.) 238
s. 4 238
s. 4 (1) 56
s. 4 (6) 296
s. 5 56
s. 6 58
s. 7 (2) 58
ss. 8, 9 58
s. 10 . . . . . 58, 59
s. 11 . . . . . 49, 58
ss. 12, 13 58
s. 15 . . . . . 57, 58
s. 16 58
s. 17 . . . . . 58, 296
s. 19 . . . . . 56, 238
s. 20 . . . . . 56, 58, 238
s. 21 (1) (ii.)—(xi.) 57

PAGE

45 & 46 Vict. c. 38 (Settled Land)
s. 22 57
s. 22 (2), (3), (4), (5), (6) 57
s. 24 58
s. 25 57
ss. 26—29 58
s. 30 . . . . . 55, 58
s. 31 . . . . . 56, 58, 238
s. 32 49
s. 33 295
s. 34 58
s. 35 . . . . . 48, 49, 296
s. 36 59
s. 37 . . . . . 7, 59, 80
s. 44 . . . . . 57, 58
s. 45 . . . . . 56, 58, 238
s. 46 57
s. 47 57
s. 48 . . . . . 58, 236, 349, 360, 362
s. 49 58
ss. 50, 51 59
s. 51 (vii.) 63
s. 52 59
s. 53 . . . . . 56, 58
s. 54 . . . . . 57, 58
s. 55 . . . . . 56, 58
s. 56 . . . . . 56, 59, 80
s. 57 . . . . . 56, 59, 238
s. 58 (1) 76
s. 58 (1) (i.) 76, 77
s. 58 (1) (viii.) 128
s. 58 (vii.)—(viii.) 60
ss. 58—62 . . . . . 49, 56
ss. 59, 60 . . . . . 113, 295
ss. 60—62 . . . . . 59, 60
s. 61 119
s. 62 114
s. 63 80
s. 64 . . . . . 56, 272, 295
Rule 2 49
c. 39 (Conveyancing) 497
s. 1 (4) (i.) 15
s. 1 (4) (ii.) 316
s. 2 106
s. 3 . . . . . 57, 150, 191, 270
s. 4 . . . . . 282, 287, 310
s. 5 272
s. 6 301
s. 7 . . . . . 114, 128
s. 8 316
s. 9 316
s. 10 . . . . . 224, 264
s. 11 164

	PAGE
45 & 46 Vict. c. 39 (Conveyancing)	
s. 12	198
s. 13	282
c. 75 (Married Women's Property)	538
s. 1	116, 324
s. 1 (2) (3)	120
s. 1 (4)	121
ss. 2, 5	116, 324
s. 12	117
s. 17	117
s. 19	116, 118, 324
s. 24	120
c. 82 (Idiots and Lunatics)	112

ERRATA.

Page 46.—Last line but two, *for* "2 Geo. II. (c. 19)," *read* "11 Geo. II. (c. 19)."

,, 71.—22nd line, *for* "11 & 12 Vict. c. 20," *read* "11 & 12 Vict. c. 70."

,, 113.—22nd line, *for* "2 Geo. IV. & 1 Wm. IV. c. 65," *read* "11 Geo. IV. & 1 Wm. IV. c. 65."

,, 177.—Note (*p*), *for* "S. 13," *read* "S. 18."

ADDENDUM.

Page 282.—Note (*x*), *Add* "Also see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (1), and s. 13."

THE MODERN LAW

OF

REAL PROPERTY.

INTRODUCTION.

PART I.

CLASSIFICATIONS OF PROPERTY.

I. Property.

PROPERTY may be considered as the object of rights or ownership, and in reference to such rights or ownership.

Thus, I make a will and leave to A. B. 'all my property.' It is plain that what I am dealing with is all that I am possessed of, my whole actual wealth, my lands, houses, consols, shares, cash, outstandings, in fact everything belonging to me; and upon my death A. B. will succeed to all I am worth. The term 'property' here would represent the substance of the thing which may be appropriated by its possessor to his own use and enjoyment. But suppose the subject which was being dealt with was not the substance itself, but the interest of an individual in it: the term 'property' might be used to note merely the extent of that interest, or, in other words, the rights of the individual in relation to it. Thus, in a piece of land there may be different proprietary interests: one person may be a tenant of it only, say for a term of years; another may, subject to this term, have an interest in it for his life; and a third may have the absolute interest, subject only to the exhaustion of the two preceding interests, namely, of the tenant for the term and of the holder for life. The interest of each person would be his proprietorship or property in the thing—something plainly different from the thing itself. It is with the regulation of the interest or proprietorship of persons in things that the Law of Property deals.

Intro. Part I.

By text-writers (*a*) this branch of the law is treated of under the head of Rights of Property or Rights of Things,—"those rights which a man may acquire in and to such external things as are unconnected with his person;" as opposed to the Rights of Persons or "such rights and duties as are annexed to the persons of men" (*b*).

II. Movable and immovable.

The Things—the objects of the rights or interests—have been differently classified. In the early ages of Europe property was chiefly of a substantial and visible, *i.e.* a corporeal, kind: under the Roman Law things corporeal were divided into movable and immovable (*c*). In England, under the feudal system introduced after the Norman Conquest, a different classification prevailed, namely, into 'lands, tenements, and hereditaments' on the one hand, and 'goods and chattels' on the other—terms still in use, to which we shall presently advert. In modern times, since the severe if not final blow to feudalism at the restoration of Charles II. (*d*), property generally has been classified into 'real and personal.' Both classifications of 'movable and immovable' and 'real and personal' suggest a distinction between that species of property which is of a fixed, substantial, and permanent character, as land, and that which is of a more shifting and transient nature, capable of being passed from hand to hand, as for instance, money. But the former classification, namely, 'movable and immovable,' which is the more natural, alone corresponds with an essential difference in the subject matter (*e*). The latter classification, namely, 'real and personal,' in fact owes its origin to the technical name given to the remedies appointed by the English law to persons deprived of their possessions. Where the possession of land was wrongfully withheld from its rightful owner, the remedy was an action for the thing itself, termed a real action (*actio in rem* (*f*)), because the real land itself would be recovered; whilst in the case of a wrongful withholding or deprivation of goods the remedy was an action against the person who had withheld or taken them away (*actio in personam* (*g*)).

Lands, tenements, and hereditaments.

Goods and chattels.

Real and personal.

(*a*) 1 St. Bl. Intro., and 2 Bl. bk. ii. c. 1.

(*b*) 2 Bl. 1.

(*c*) Institutes of Justinian, by Sandars, p. 38.

(*d*) 12 Car. II. c. 24. See *post*, p. 34.

(*e*) Maine's Ancient Law, 273.

(*f*) Co. Litt. 285 *a*, ed. by Thomas, vol. iii. 348.

(*g*) If the plaintiff recovered in a real action, a writ was directed to the sheriff of the county commanding him to give

Real actions, the forms of which were various and complicated (*h*), were, with the exception of four, namely a writ of right of dower, or writ of dower *unde nihil habet*, or a *quare impedit*, or an ejectment, abolished in 1833 by 3 & 4 Wm. IV. c. 27, s. 36 (*i*); those which remained were completely remodelled by the Common Law Procedure Act, 1860 (*k*), of which the most important was that of ejectment. Ejectment (*ejectio firmæ*) had been, until the end of the 15th century, a personal action by the tenant for a term of years claiming damages for a forcible ouster from the land demised; it being then resolved by the judges that the land also might be recovered, ejectment became the ordinary mode of enforcing a right of entry (*l*). It was brought with the view rather of recovering possession of the land than in assertion of a title to it which should be altogether indefeasible. For the law considering the one in possession as owner until the contrary was proved, the plaintiff recovered by the strength of his own and not by the weakness of the defendant's title; should he succeed, he in turn might be ejected by another showing a still better title (*m*). Now under the Judicature Act there is no special action of ejectment, and for the future in the High Court an action for the recovery of land will, with a few exceptions, proceed in like manner to any other action (*n*). This does not, however, affect the County Courts, which, under the County Courts Act, 1867, have a special jurisdiction in ejectment where the rent or value does not exceed £20 per annum (*o*).

---

the plaintiff actual possession of the land so recovered. In personal actions the judgment was that something in special be done or rendered by the defendant; and in order to compel him so to do and to see the judgment executed, a special writ of execution issued to the sheriff according to the nature of the case. But even in an action for the specific recovery of personal chattels unjustly detained, the wrong-doer could not be compelled to a restitution of the identical thing taken or detained; he had his election to deliver the goods, or their value; "an imperfection in the law," Blackstone remarks, "that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice; and not, like land and other real property, always amenable to the magistrate." (3 Bl. 413.) This imperfection, however, was partially removed by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 78, which deprived the defendant, where the chattel was forthcoming, of the option of giving it up or paying the value whenever the plaintiff deemed money to be an inadequate compensation for the loss to him of the chattel.

(*h*) See Smith's Action at Law, ch. 3.

(*i*) They are there enumerated, and see 3 Bl. c. 10, for an account of them.

(*k*) 23 & 24 Vict. c. 126.

(*l*) Smith's Action at Law, ch. 13, and Co. Litt., ed. by Thomas, vol. iii. p. 208.

(*m*) Broom's Commentaries, 754.

(*n*) See Wilson's note to Rules of Court, 1875, Ord. II. r. 3.

(*o*) 30 & 31 Vict. c. 142, s. 11. For

Intro. Part I.

Blackstone says (*oo*) :—

"Things personal are goods, money, and all other movables which may attend the owner's person wherever he thinks proper to go."

As will appear from what has already been said, this is not a correct definition, and, as a fact, goods and chattels were not usually called things personal till they had become too numerous and important to attend the persons of their owners. As Sir H. Maine has observed (*p*) :—

"The lawyers of all systems have spared no pains in striving to refer these classifications to some intelligible principle, but the reasons of the severance must ever be vainly sought for in the philosophy of law : they belong not to its philosophy, but to its history."

The same learned writer observes (*q*) :—

"In all the countries governed by systems based on the French codes, that is, through much the greatest part of the continent of Europe, the law of movables, which was always Roman Law, has superseded and annulled the feudal law of land. England is the only country of importance in which this transmutation, though it has gone some way, is not nearly accomplished."

Lands, tenements, and hereditaments.

Although the classification of property into 'real and personal' is the prevailing one of modern English law, in the earlier or feudal period of its history what is now usually referred to as real property was designated under one of the three general heads, Lands, Tenements, or Hereditaments ; what is now spoken of as personalty being at the same time distinguished by the title of Goods and Chattels. These terms are still recognized, and are commonly used in deeds ; it is therefore necessary to understand what is meant by and comprised in these terms.

Land.

'Land' to a certain extent explains itself. All know what, in a popular sense, is meant by the expression. But this does not accurately define its legal meaning, which is, not only everything constituting the external substance of the earth, that is, its mere surface soil, but all above and below it. Thus, a structure on the land, as a house, a forest covering the land, or any trees growing out of it, is included under the term 'land,' and so is everything

---

an account of the procedure in such Courts, see Pollock and Nichol, Pt. III. c. 3, and Pitt Lewis's C. C. Pr., bk. iii. c. 2.

(*oo*) Vol. ii. p. 16.
(*p*) Ancient Law, c. 8, p. 274.
(*q*) *Ib.* 283.

lying beneath its surface, as ores, fossils, mines, &c. And, as water must flow over land, a gift of land will carry the water which covers it, though in terms water be not expressed. On the other hand, suppose the gift to be of the water instead of the land over which it flows, that land will not pass, but a right of fishery only. For, says Blackstone (*r*) :—

"Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it, but the land which that water covers is permanent, fixed, and immovable, and, therefore, in this I may have a certain substantial property, of which the law will take notice and not of the other" (*s*).

Again, of a gift of land he says :—

"If a man grants all his lands he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows."

The same thing is thus expressed in the Touchstone :—

"By the grant of the land or ground itself all that is *supra*, as, houses, trees, and the like, is granted, for '*cujus est solum, ejus est usque ad cœlum;*' and also all that is *infra*, as mines, earth, clay, quarries, and the like" (*t*).

But this extensive signification of the word 'land' may be controlled by the context, as, where land is spoken of in plain contradistinction to houses, it will not be taken to comprise them; so mines lying under a piece of land may be excepted out of a conveyance of such land. On the other hand, under a gift or grant of a house, or, which is the same thing, a messuage, land commonly occupied with it would not pass unless immediately annexed to and enjoyed with the house, as out-buildings, orchard, garden, and curtilage (or courtyard) (*u*).

(*r*) Vol. ii. p. 18.

(*s*) See also Co. Litt. 4*a* and 4*b*, ed. by Thomas, vol. i. p. 197.

(*t*) Sheppard's Touchstone, 90. Sheppard's Touchstone is now admitted to have been the work of Mr. Justice Doderidge. Sheppard is said to have purchased the judge's library after his death in 1628, and this manuscript of the Touchstone was found in it. (See Preston's Edition,—his address to the reader, and Hilliard's address.) The same judge is also supposed to have been the author of Wentworth's Office of an Executor. (Wms. on P., p. 20, n.; Wms. on Executors, i. 710, n.).

(*u*) Shep. T. 94.

Intro. Part I.

Under the Railway Clauses Act (*x*), in a purchase of land by a railway, mines and minerals, unless expressly mentioned in the conveyance, are generally excluded. In various Acts of Parliament the word 'land' has a special meaning assigned to it. Thus by the Acts of Parliament Abbreviation Act, 1850 (*y*), it is enacted that 'land' shall include messuages, tenements, and hereditaments, houses and buildings of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure (*z*).

Tenement.

The word 'tenement' will be better understood when we come to the more detailed explanation of the feudal system (*a*). It is sufficient to say here, that under that system the greater part, if not the whole, of the soil of the country, not retained by the Crown itself, was held by some inferior tenant of some superior lord, on the terms of rendering rents and services for the enjoyment; and hence the subject of holding was called a 'tenement,' or thing held (from *tenere*, to hold). It embraced not merely land in its outward visible and substantial semblance, but certain interests arising out of it; for example, a rent issuing, as it is technically termed, out of the land itself, payable by the holder of the land to another; a right of common, that is, to turn out cattle to pasture on the land of another; a right of turbary, that is, of cutting turf on another's soil. It also included offices for life (*b*). In its strict legal signification, a tenement was something which might be holden, that is, be the subject of tenure; but popularly it was often, as it still is, applied to designate houses or other buildings, and used synonymously with them. Thus a house is commonly described in a deed as "all that messuage or tenement" (*c*).

Hereditament.

The word 'hereditament' is the largest word of all in that kind, says Lord Coke, for whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real or personal, or mixed (*d*). It includes money directed to be laid out in lands,

(*x*) 8 & 9 Vict. c. 20, s. 77.

(*y*) 13 Vict. c. 21, s. 4.

(*z*) See also the Land Transfer Act, 1875 (38 & 39 Vict. c. 87, s. 4), and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, s. 2 (ii.)), *post*, p. 8, and the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 2 (10) (i.). As to the force and extent of particular words of description, see Jarman on Wills, vol. i. c. 24.

(*a*) *Post*, Part ii.

(*b*) Shep. Touch. 91; Co. Litt. 6*a*, ed. by Thomas, vol. i. p. 219.

(*c*) See 2 Da. i. 237.

(*d*) Co. Litt. 6*a*, ed. by Thomas, vol. i. p. 219.

and leaseholds (*e*). Hereditaments then were not confined to what would strictly fall under the denomination of immovable or real property.

English Law recognizes what are called 'heirlooms,' the enjoyment of which is annexed by special custom to the family mansion or land, and passes accordingly on the death of the last owner, together with the inheritance, to the heir or devisee of the inheritance, as the Crown jewels, a particular horn or bugle hung up in the hall, or the boxes in which the title deeds of the land are kept. These also are hereditaments. They cannot be separated from the inheritance by will, though the owner might during his life have sold or disposed of them. 'Heirloom' means 'loin' or 'limb' of the inheritance. The term heirloom is not uncommonly, but incorrectly, applied to pictures, plate, or furniture, directed by will or settlement to go with a family mansion or estate, for they would descend to the personal representative (and not to the heir) of the first person who takes a vested estate of inheritance (*f*). So the benefit of a condition annexed to an estate was a hereditament; for example, suppose an estate granted to another on a condition, but to revert to the grantor on failure of the condition, this condition and its benefits would devolve upon the heir. So also titles of nobility devolving on the heir were hereditaments (*g*).

Hereditaments were divided into the two classifications of corporeal and incorporeal; the former being "such as affect the senses, and may be seen and handled by the body," as land, houses, and so forth; the latter "such as are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation"—for example, a rent or annuity payable out of land; a right of fishing in a particular stream, or the benefit of a flow of a particular stream; a right of way or of common; an advowson, that is, a right to present a priest to the emoluments of a church; the right to light and air free from any obstruction from the occupier of the adjoining land (*h*).

a. Corporeal.
b. Incorporeal.

(*e*) See 3 Da. pt. i. 560. Power of sale and exchange to trustees over any "hereditaments," 23 & 24 Vict. c. 145.

(*f*) See Wms. on Exors., pt. ii. bk. ii. c. 2; *Fane* v. *Fane*, L. R. 2 Ch. D. 712, *D'Eyncourt* v. *D'Eyncourt*, L. R. 3 Ch. D. 635; and Settled Land Act, 1882, (45 & 46 Vict. c. 38), s. 37.

(*g*) Co. Litt., ed. by Thomas, vol. p. 219, note.

(*h*) 2 Bl. 17, 20

Intro. Part I.

Under one or other of the three terms of Lands, Tenements, and Hereditaments was included every species of real property, and the phrase is still in use to express that every kind of real or immovable property is intended.

'Land' in Conveyancing Act, 1881.

In the Conveyancing and Law of Property Act, 1881 (*i*), 'land,' unless a contrary intention appears, includes land of any tenure (*k*), and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings.

Goods and chattels.

'Goods and chattels' at the period when these terms were introduced into English Law were intended to embrace all property not comprised under one or other of the terms Lands, Tenements, and Hereditaments; and they are used in that sense to the present day as equivalent to Personalty.

The precise origin of the term 'chattel' is left in some obscurity. Lord Coke says (*l*), "'Goods,' *biens*, *bona*, includes all chattels, as well real as personal. 'Chattels' is a French word, and signifies goods which by a word of art we call *catalla* (*m*)."

Blackstone (*n*) says that in the Grand Coustumier (*o*) of Normandy the word 'chattels' is used, and set in opposition to a fief or feud; so that, not only goods, but whatever was not a feud, were accounted chattels. It may be sufficient to state that formerly (with one exception, that of chattel real, to which we shall presently advert) the word was intended to designate everything movable with or personal to a party; for instance, animals, household-stuff, money, jewels, corn, garments, and everything else that can be properly put in motion and transferred from place to place (*p*); but in later times it came to be applied to such things as debts which might be owing to a party, his stock in the public funds, shares in companies, patents, and copyrights. These, like incorporeal hereditaments (which, however, existed from the earliest times), were in the nature of incorporeal chattels. They have been styled Choses in Action, while corporeal chattels, by way of distinction, have been termed Choses in Possession. They were so styled because they were things in which a man had not the possession or actual enjoy-

a. Choses in action.

b. Choses in possession.

(*i*) 44 & 45 Vict. c. 41, s. 2 (ii.).

(*k*) See *post*, Part ii.

(*l*) 118 *b*.

(*m*) Chaucer, in his description of the Poure Wydow in the Canterbury Tales (The Nonne Prestes Tale), says—

"Syn thilke day that sche was last a wif,
In pacience ladde a ful symple lyf,
For litel was hire *catel* and hire rente."

(*n*) 2 Bl. 385.

(*o*) *i.e.*, 'customary,' which contained account of local customs of tenure.

(*p*) 2 Bl. 387.

ment, but only a right to demand it by action or other proceeding. At first they could not be assigned, for it was considered that the transfer of a law suit would improperly multiply litigation; and until the Judicature Act, 1873, except in the case of negotiable instruments, &c. (*q*), the assignee's right was not complete at law unless the debtor assented to the transfer, and any action must have been brought in the original creditor's name. This, however, was not so in equity, and now by s. 25, § 6, of the Judicature Act, 1873 (*qq*), an absolute assignment by writing, with express notice in writing to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, is effectual in law to pass and transfer the legal right.

Chattels real.

At the time when these earlier designations of the different kinds of property were introduced, and for long after, such was the condition of society that it was the more substantial proprietorship of the soil, afterwards termed 'Real Property,' which almost alone attracted the consideration of the law. No more striking illustration can be afforded of the little respect in which anything not partaking of the substantial ownership of the land was held in the earlier period of the English law than the fact that, even where land itself was let out to lease, the interest acquired by the tenant was treated as chattel only, though complimented with the title of a Chattel Real. At first, probably, the interest thus acquired, namely, the term granted, could be but of short duration, and was therefore of no great consideration. Leases appear originally to have been merely of the nature of farming ones, the very expression of the old lease being "to have and to hold and to farm let" (*r*). The owners of the soil itself were in those days usually too much occupied in attacking or guarding against their neighbours to trouble themselves much with the personal cultivation of their own lands, and such an occupation would have been considered degrading. Hence the cultivation was turned over to their tenants, whose interests, however, and the estates acquired under their leases, were at first held, even in the eye of the law, but in light esteem. The lease

(*q*) *e.g.*, Assignments of policies of life assurance, 30 & 31 Vict. c. 144.

(*qq*) 36 & 37 Vict. c. 66.

(*r*) 'Farm,' or 'feorme,' is an old Saxon word signifying provisions (Spelm. Gl. 229); the greater part of rents were reserved in provisions (2 Bl. 318).

Intro. Part I.

was considered, not as a conveyance of any real interest in the land, but only as a contract or covenant for the enjoyment of the rents and profits; and the only remedy for the lessee, if ejected, was by writ of covenant against the lessor to recover the term, if in being, and damages, in case the ouster was committed by the lessor himself, or, if the term had expired or the ouster had been committed by a stranger, then to recover damages only (*s*). A practice, however, grew up later of granting out leases for very long periods, in duration almost equivalent to the ownership of the land itself, sometimes for 100 years or even 1000 years, and this is in modern English practice (*t*) a very common way of creating a charge upon land, the term in the land being created as a security for the charge. Mortgages were formerly framed upon this principle (*u*). Yet notwithstanding the length of the term and the practical importance of its ownership it still retained the character of a chattel only, and like other personalty would on the death of the termor, or lessee, go to his personal representatives, and not descend to his heir.

Trees.

Although the main division of property in English law is into Real and Personal, there are some few subjects of property partaking of such mixed character, that it depends on the circumstances of the case to which general classification they are to be ascribed. Thus, trees while standing on the ground are considered to partake of the nature of the soil itself, and are part of the realty. This flows out of the principle already explained, that whatever is attached to the soil acquires the character of the soil itself, as though it were part of it. But suppose the trees cut or blown down and thus severed from the land, they immediately become part of the personal property of the owner.

Emblements.

Growing crops or 'emblements' (*emblavances de bled, i.e.*, springing corn)—*fructus industriales*—unlike trees and other natural growths (*x*), devolve on the personal representative and not on the heir of the owner of the land; the reason being, that, as annual crops are mainly the result of labour incurred at the expense of the owner's personal estate, the personal estate ought to reap the benefit and have the crop. But though the personal representative will take them as against the heir, a devisee of

---

(*s*) 3 Bl. 156.

(*t*) In wills and settlements. For instance, see 4 Da. 472.

(*u*) For instance, see 2 Crabb, 1136.

(*x*) *e.g.*, grass, though ready to cut for hay.

the land will take them against the personal representative, unless it appear with certainty that the testator intended some one else to take them (*y*).

And further, in favor of agriculture, the law was established that a tenant having a limited interest in the soil and of uncertain duration, *e.g.*, for his own life, or during the life of another, should himself or his personal representatives be entitled to the crops sown during his tenancy and reaped after its cesser or determination. As laid down by Denman, C.J., in 1833 (*z*), the principle is that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labour. The tenant is entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. And he is entitled to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period, *e.g.*, clover.

Now, where the lease ceases by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, a statute of the present reign (*a*) recompenses the tenant at rack-rent, not by the emblements, but by a permission to hold until the expiration of the current year of his tenure.

Trees when severed from the ground, and the fruit and produce of them when severed from the body of the tree, and emblements, are sometimes called 'chattels vegetable' (*b*).

Fixtures.

By the ancient rule of the common law, expressed in the maxim *quicquid plantatur solo, solo cedit*, whatever is planted or built in the soil or freehold becomes part and parcel of it. Thus, as we have seen, a house becomes parcel of the land on which it stands. In like manner whatever was annexed or affixed to the soil, or any building which stood upon it (and was not merely laid upon or brought into contact with it) was treated as an addition to the possession of the owner of the soil, and was termed a 'fixture.' But the old rule has in later times, upon

---

(*y*) *Cooper* v. *Woolfitt*, 2 H. & N. 126. For the devisee is not *hæres factus*, but takes by conveyance. He is therefore entitled to everything which is appurtenant to the land. (*Per* Pollock, C. B.) He is a purchaser in law. (See *post*, Ch. on Descent.)

(*z*) In *Graves* v. *Weld*, 5 B. & Ad. 117.

(*a*) 14 & 15 Vict. c. 25. See *post*, p. 46.

(*b*) 1 Wms. on Exors., pt. ii. bk. ii. s. 2.

Intro. Part I.

motives of public policy (*c*), to encourage tenants for life to do what is advantageous to the estate during their term (*d*), and in favor of trade (*e*), been greatly relaxed in favor of tenants for terms of years, that is, as between landlords and tenants; and in favor of the personal representatives of a tenant for life as against the person next entitled to the estate. The tenant for a term of years may now remove articles set up by him for the purpose of trade, or for the purpose of ornament or domestic convenience, as marble chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, and the like (*f*), provided in the absence of special contract they are removed during the term (*g*); and the same articles may be removed by the tenant for life or by his personal representatives if put up by himself, but if erected by the owner they will pass with the house to the devisee or heir. There is a stricter limitation of the tenant's right to remove what are styled ornamental fixtures than to his right to remove trade fixtures. The general rule as to the former seems to be, that there must be no permanent injury to the tenement caused by the removal; but as to the latter, the right to remove them is generally bounded by the rule only, that the principal thing "shall not be destroyed by the accessory" (*h*). The question often arises in cases of distress for rent by a landlord, the rule being that he cannot distrain fixtures; and so it has been held that railways by their annexation to the soil become fixtures, and are not distrainable (*i*). Now, as a learned writer has expressed it, "the doctrine of fixtures rests on a series of judicial decisions in contravention of an ancient rule in favor of the freehold" (*k*), and the word 'fixtures' has come to be

---

(*c*) On the subject of public policy, see *per* Jessel, M.R., in *Besant* v. *Wood*, L. R. 12 Ch. D. 620.

(*d*) *Per* Ld. Hardwicke, *Lawton* v. *Lawton*, 3 Atk. 15.

(*e*) *Elwes* v. *Mawe*, 2 Sm. L. Cas. 152; *per* Ld. Ellenborough; (note to Co. Litt., by Thomas, vol. iii. p. 234).

(*f*) *Elwes* v. *Mawe*, 2 Sm. L. Ca. 153.

(*g*) *Pugh* v. *Arton*, L. R. 8 Eq. 626.

(*h*) As to trade fixtures, see *Lawton* v. *Lawton*, 3 Atk. 13; a fire engine set up for the benefit of a colliery by a tenant for life was held to be part of his personal estate. As to ornamental fixtures, see *Buckland* v. *Butterfield*, 2 B. & B. 54; a conservatory erected by a tenant for years and attached to the dwelling-house, was held to have become part of the land, and not removable.

(*i*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306; and see *Rumsey* v. *Dumergue*, 2 H. & C. 777, where a tenant by lease had renounced the ordinary right of a tenant to disannex fixtures during the term, and therefore they could not be taken in execution by the sheriff.

(*k*) Amos, Preface, iv.

used in a sense directly the reverse of its natural and original signification. In 1834, Parke, B. (*l*) said :—

"The term 'fixtures' has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who annexed them."

As regards buildings subservient to purposes of agriculture, as distinguished from those of trade, the old rule prevails, namely, that all those erections whose foundations are let into the ground become part of the realty, and belong to the landlord (*m*). But from this must be excepted cases falling within 14 & 15 Vict. c. 25, s. 3, which makes buildings, engines, or machinery erected by the tenant with the consent in writing of the landlord removable by the tenant, if the landlord after notice do not elect to purchase; or within the Agricultural Holdings Act, 1875 (*n*), which repeats the provisions in the carlier statute, and also applies to fixtures erected without the consent of the landlord.

Animals.

Another subject of property which should be here referred to is animals. They have been classified into such as are tame or domesticated, and seldom if ever found wandering at large, and such as are wild or usually found at liberty—*domitæ naturæ* and *feræ naturæ*. Among the former are horses, kine, sheep, poultry and the like, also "hounds, greyhounds, spaniels" (*o*), and the like; in these a man may have an absolute property which is personal. The latter may become the subject of a qualified property, as deer in a park, game on an estate, fish in a pond, doves in a dove-house, and the like; which, so long as they are left at large in their natural condition, are considered as incident to the land and inheritance, in other words, as accessory to and partaking of the nature of the realty, and they descend to the heir. But the owner of the land has no true property in the animals left at large, for they belong to him only *ratione privilegii*, for his game and pleasure so long as they remain in the privileged place (*p*), and until there is a qualified property in them no larceny of them can be committed at common law (*q*). But if a man

(*l*) In *Hallen* v. *Runder*, 1 C. M. & R. 276.

(*m*) *Elwes* v. *Maw*, 2 Sm. L. Ca. 153; and see Brown on Fixtures, s. 11. The subject of Fixtures is treated at length in Wms. on Exors., vol. i. pt. ii. bk. ii. c. 2.

(*n*) 38 & 39 Vict. c. 92.

(*o*) Wentworth on Exors., p. 148.

(*p*) The Case of Swans, 7 Rep. 17.

(*q*) Archbold, tit. Larceny.

Intro. Part I.

reclaim them, and confine them within his immediate power, they will, so long as they do not regain their natural liberty, be his personal property, and pass to his executors on his death (*r*).

Title-deeds.

The title-deeds of land so far partake of the nature of realty, that they pass with the land itself on its devolution from an ancestor to an heir, or by Will to the devisee; while, supposing an absolute owner of land to pledge his land by depositing the deeds as a security for the loan in the hands of the pledgee or mortgagee, they would be considered personalty in his hands, and his special property in them would pass on his decease to his personal representative (*s*).

Mixed.

The same property may at the same time be real for one purpose and personal for another. It frequently happens that for the purposes of trade, or the carrying on of public undertakings, the possession of land is requisite. For example, parties engaging in a commercial partnership for the manufacture of sugar or of silks would require a factory for the purpose. Now this, though in itself realty, as between the partners and their representatives would, if owned by the partners, be part of the common stock or capital of their partnership, and the interest in it would, as between the partners, be in the nature of personalty, and on their death devolve not on their real but on their personal representatives (*t*).

(*r*) 1 Wms. on Exors., 710; Wentworth on Exors. 143; Co. Litt. ed. by Thomas, vol. iii. p. 294. See the leading case as to deer being reclaimable, *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768. See also a curious case, *Hannam* v. *Mockett*, 2 B. & C. 934, in which it was held an action could not be maintained against a man for disturbing and driving away rooks, on the ground that the plaintiff could not have any property in them or shew any right to have them resort to his trees. The plaintiff had been in the habit of making profit by killing and taking the rooks and their young.

(*s*) The Touchstone, 469, quoted in Wms. on Exors. 730.

(*t*) *Per* James, L.J. The share of each of the partners is not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, and when the assets are got in, the debts paid, and the amounts realised. But then, although there be the right of each partner in so much capital stock, which is personalty, and I should say in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the Statute (of Mortmain, as an interest in land). Whatever is the amount coming due to that partner, that partner has an immediate and direct charge or incumbrance on the land for that very sum, and his right is to have the land sold for the purpose of realising that charge or incumbrance which he has upon it. (*Ashworth* v. *Munn*, L. R. 15 Ch. D. 369.)

Again, nothing could well be more real and immovable than a railway. But the land on which a railway is constructed forms but part only of the general capital of the shareholders. They subscribe their money in the expectation of getting dividends out of the profit of the traffic, the working of the undertaking; and their shares in the whole concern are in the nature of personal and not real property. Thus, though the land occupied by the railway is in itself realty, and is liable to be rated as land (*u*), yet the undertaking itself and the profits of its working are personalty. It was in 1836 decided in a case relating to shares in the Chelsea Waterworks Co. (*x*), that the shares were personal property, and that real property held for the purposes of a trading company was in equity to be deemed in the nature of personal estate (*y*).

Property in Conveyancing Act, 1881.

From what has been said, the definition of property in the Conveyancing and Law of Property Act, 1881, will be understood. In that Act 'property,' unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest (*z*).

III. Descent or distribution of property.

There will have been noticed from what has already been said one main distinction which exists in English law between real and personal property in reference to its ownership. Real property, in the absence of other disposition by will or settlement, descends at the death of the owner to the heir or real representative, who is ascertained by the rules hereafter explained (*a*). Personalty, on the other hand, in such case devolves on the administrator who is appointed by the Court, for distribution (after payment of debts) among the next of kin.

Lex situs. *Lex domicilii.*

Another leading distinction between movable and immovable, *i.e.*, personal and real property, is, that, as to the latter, the

(*u*) *N. E. Ry. Co.* v. *Local Board of Leadgate*, L. R. 5 Q. B. 157; *Queen* v. *Midland Ry. Co.*, L. R. 10 Q. B. 389; *Queen* v. *London and North Western Ry. Co.*, L. R. 9 Q. B. 134.

(*x*) *Bligh* v. *Brent*, 2 Y. & C. 268.

(*y*) In the judgment by Alderson, B., the distinction was pointed out between the Chelsea Waterworks Company and the New River and Avon Navigation Companies, in which the shares were held to be real property. Now canal and railway shares are made personal property by the Acts of Parliament under which the companies are incorporated, and by the express provision of the Companies Act, 1862 (s. 22), shares in companies constituted under that Act are declared to be personal estate.

(*z*) 44 & 45 Vict. c. 41, s. 2 (i.), and see the Conveyancing Act, 1882, (45 & 46 Vict. c. 39), s. 1, (4) (i.).

(*a*) See chap. iv., *post*.

Intro. Part I.

lex sitûs, or *lex loci rei sitæ*, declares the rules of inheritance; while as to the former, they are declared by the law of the domicile of the owner, or as it is said, *mobilia sequuntur personam*. As expressed by Lord Loughborough (*b*):—

"It is a clear proposition not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country" (*c*).

The true reason of the difference seems to be, as regards immovable property, the system of feudal law or considerations referring to the supposed interest of the State, as regards movables, the necessity of dealing with a man's fortune as an entirety, the corporeal chattels forming one mass with the active credits. "It would," says Mr. Westlake, "be intolerable that the several corporeal chattels and active credits should be administered on principles varying with the casual situation of each of the former, and with the true seat of each particular tort or contract that might be involved in the latter, rather than on one uniform rule for the whole body of rights dealt with" (*d*).

(*b*) In *Sill* v. *Worswick*, 1 H. Bl. 690.

(*c*) See Westlake's International Law, § 261, 290. This principle is recognized in the Indian Succession Act.

(*d*) Westlake, § 263.

PART II.

TENURE OF PROPERTY—FEUDAL SYSTEM (*a*).

I. Proprietorship. Tenure.

THE Law of Property operates then on something, the subject of individual possession or enjoyment, which in the contemplation of English Law falls under one of the three classifications of property—1. Real; 2. Personal; or 3. Mixed. A Law of Property necessarily varies with the municipal institutions of the country in which it is found. We have to do only with that of England; by this law is regulated the duration and other incidents of ownership.

With regard to personal or movable property, the individual who possesses it does not hold it of another, but is ordinarily the absolute owner of it. The money in one's pocket is not held of any other person; nor are consols or shares in a partnership. Personal chattels are sometimes in the possession of one while belonging to, and so far in a sense held under, another. One's horses or carriages may be hired, or the furniture in one's house may be let with the house itself; and so far each may be said to be held of some other owner. But this is not the sense in which the expression 'holding' or 'tenure' is used in English Law. That which ordinarily determines the legal right of property in personal chattels is possession. It is by delivery of possession that the *primâ facie* right to personal chattels ordinarily passes, if the law has not enjoined some particular mode by which a transfer is to be effected, as in the case of ships, by bill of sale.

It is to real, or immovable, property only that a system of tenure, —that is, a holding by one man of another,—seems capable of application, and to this alone it has been applied in England. Tenure (*b*) is based on the theory of acknowledgment of a higher and paramount order of ownership in another, and it implies the rendering to that other of some services in return for the limited proprietorship it concedes.

(*a*) The text has in the main been compiled from Hallam's Middle Ages, vol. i. ch. 2, and vol. ii. ch. 8; Robertson's Charles V., vol. i. sect. 1, and note viii.; Hume's History of England, vol. ii. App. ii.; Bl. Com. vol. ii. chs. 4, 5, and 6; 1 St. Bl. vol. i. bk. ii. pt. i. ch. 2, and Wms. on Real Property (11th ed.), p. 2, pt. i. ch. 5, and pt. iii.

(*b*) From the Latin *tenere*, to hold.

Intro. Part II.

II. Landed estates.

There appear to have been two descriptions of ownership originally prevailing on the Continent of Europe, one of which was known as Allodial and the other as Feudal.

a. Allodial.

The barbarous tribes which issued from the north of Europe and overran the Continent, overturning the Roman Empire, in the fourth to the sixth centuries after Christ, were freemen who conquered for themselves (*c*). Upon settling in the countries which they had subdued, the victorious troops divided the conquered lands (*d*). Some were allotted to the king or chief of the conquering tribe, and the rest were either divided among those who had followed his standard, or left in the possession of their original though conquered proprietors (*e*).

Those allotted to the soldiery acquired the name of Allodial, and were enjoyed as free and independent property; they were held of no one, and charged with no service. The soldiers held these lands as freemen in full property, and could dispose of them at pleasure or leave them as an inheritance to their children (*f*). They were bound only, and that by tacit consent, like in other compacts which hold society together, to take arms in defence of the community from foreign hostile aggression, and any one refusing or neglecting so to do was liable to a considerable penalty (*g*). Those left in the hands of the conquered owners appear to have acquired the same designation.

b. Feudal. Benefices—fiefs or feuds.

Of those allotted to the chief, portions under the name of 'benefices' were afterwards frequently distributed by him among his adherents—for the most part, probably, his courtiers, or leading companions in arms. The interest, however, thus granted out was not originally in the nature of full property, that is, in the sense of its holder having power to transmit or alienate it. It was of an usufructuary nature only; that is, the grant was at first limited to the person of the individual on whom it was conferred, the actual ownership in the land still remaining in the chief. It is not certain for what duration the grants were at first made, whether they were revocable at pleasure, or were for the life of the beneficiary. It was not till later that they were given to a man and his heirs; and, after such gifts came to be made, the lands did not descend to the heirs unless they were mentioned in the gift (*h*).

(*c*) Rob. sect. i.
(*d*) *Ib.* note viii.
(*e*) Hume, vol. ii. App. ii.
(*f*) Rob. sect. 1, note viii.
(*g*) *Ib.*
(*h*) 1 Hallam, ch. 2.

In return for this usufruct services were demanded; though it does not appear that any conditions of military service were expressly annexed to the grants. These services were, however, commonly at first of a military character, such as the rallying round the standard of the chief, for purposes of foreign invasion or domestic defence, with an adequate body of armed retainers in due military equipment; and to this was added the rendering of certain stipulated payments in money. Among the more prominent of these were those relating to the personal position of the grantor, as his ransom if taken captive in war; and to domestic events occurring in the history of his family, as the dedication of his eldest son to arms on his arriving at manhood by the conferring on him of knighthood, or the marriage of the grantor's daughter.

The system was based on a principle of mutual aid and protection. The tenant aided the lord in his wars and his defences, and contributed in money on pressing occasions. The lord in return bestowed on the tenant his patronage and his protection. The great object of the system was, on the one hand, to secure to the chief a feudatory soldiery bound to follow him to his wars or defend his possessions, with the addition of pecuniary supplies on requisite occasions; on the other, to secure his protection for his tenant against the aggressions or oppressions of others. The essential principle of a fief was a mutual contract of support and fidelity (*i*).

The interest thus granted to the tenant was originally termed a Benefice; but the holding itself afterwards acquired the designation of a Fief or Feud, and hence the derivation of the term Feudal System.

The word Feud was used in opposition to *allodium*, and expressed that which was held of a superior *beneficio*, while the latter was strictly proprietary, held *proprietate*. The exact meaning and derivation of the words are uncertain (*k*).

Subinfeudation.

In course of time the more limited interest thus granted to the feudalist acquired greater stability, and a hereditary character; and, subject to the rendering of the prescribed services, and paying the pecuniary charges to the superior lord, by degrees the individual who held under him acquired an interest commensurate with his own. The inferior holder, having acquired more per-

(*i*) 1 Hallam, ch. 2.

(*k*) 1 Hallam, ch. 2, note; Rob. sect. i. note viii.

Intro. Part II.

manence in his own possession and a higher position, soon began to imitate the example of his superior, and to grant out to others those portions of the soil, the subject of his own grant, not required by himself, on analogous terms to those under which he himself held from his superior. Thus, the king having made a grant to some great baron, he in his turn might grant to a lesser, and the lesser to another still inferior, to be held of themselves by a similar tenure. And so the whole property of the soil became parcelled out in a course of successive subinfeudation.

Creation of a feud :— Give and Grant— Feoffment. Investiture— Livery of seisin.

A feud was conferred or created by words of gratuitous donation, expressed in Latin '*Dedi et Concessi*,' 'I have given and granted;' these were the operative words in a 'feoffment,' as a conveyance or transfer of lands from one person to another was afterwards called in England; and that even after it was expressed in writing. The gift was perfected by the ceremony of Investiture, which consisted in an actual putting into possession by the lord or his deputy in the presence of the other vassals of the lord, called a Livery of Seisin; or symbolically by the delivery of a turf or stone, or whatever was usual by local custom (*l*).

At the time when writing was but little practised, on occasion of either the original investiture or any subsequent transfer or dealing with the land, the record of the transaction had to be looked for in the memory of the neighbourhood. This public delivery of possession, or something symbolical for it, long continued in England to accompany any change in the ownership; and even after written charters or deeds began to supply the place of memory, the 'feoffment' or charter of infeudation (in course of time the ordinary conveyance resorted to) required, in order to give validity to its operation, a symbolical delivery of possession or Livery of Seisin. On the part of the vassal the important ceremonies of taking the oath of 'fealty' or fidelity, or as we should now say allegiance, and of doing 'homage' '*devenio vester homo*' (*m*), had to be gone through. The investiture complete, the duties of the vassal ('*gwas*'—Celtic for 'servant') commenced (*n*).

Fealty. Homage.

(*l*) 1 Hallam, ch. 2.

(*m*) "I become your man from this day forward of life and limb and of earthly worship, and unto you shall be true and faithful, and bear you faith for the tenements that I claim to hold of you, saving the faith that I owe to our Sovereign Lord the King."—Littleton, s. 85; (ed. by Thomas, vol. i. p. 252). A special Act of Parliament was passed, 18 H. VI., to excuse the kissing in the case of homage made to the king, by reason of pestilence.

(*n*) 1 Hallam, ch. 2.

In addition to the vassal's services of a military nature, there were certain feudal Incidents created by the nature of the contract (*o*) in favour of the lord. Thus a 'relief' was paid on the taking up by the heir of his ancestor's estate, and a 'fine' was paid on alienation of the lands.

Incidents: 1. Relief. 2. Fine.

Both had their origin in the unsettled and ill-defined condition in which, on the creation of feuds, the interest of the tenant stood; and, while his holding was in the nature of a personal one and his interest not treated as either descendible or transmissible, it was a present consideration or acknowledgment paid to the lord for his sanction, to the descent in the one case, and to the alienation in the other. The former was called a Relief because it re-established the inheritance—'*incertam et caducam hereditatem relevabat*' (*oo*).

With respect to the Fine payable on alienation, the theory of the feudal system involved the personal abilities of the feudatory to discharge the obligation of the feud, of which the more prominent was the power of its holder to serve his lord in war. The position of the son might to some extent recommend him to the succession, but in the case of alienation to a stranger—that is, from himself, or his posterity who might be presumed to inherit his valour, to others who might prove less able—the consent of the lord might be expected to be requisite.

In the matter of alienation too, there was a reciprocity between the lord and the tenant, for the lord could no more throw off or transfer to another the liability to afford protection which he had undertaken himself to give to his tenant and part with his general seignory without the tenant's consent or 'attornment,' as it was called in England (*p*), than could the vassal transfer his own feud without the consent of the lord.

When the feud afterwards became a more solid and permanent holding, the burthens attached long continued, although the state of things which had originally produced them had passed away. Thus, in process of time, the personal attendance of the tenant at the wars of his lord prescribed by Knight's service getting inconvenient, it was compounded for a pecuniary payment called Scutage or Escuage (*q*).

3. Scutage.

Two other incidents, Forfeiture and Escheat, were very im-

4. Forfeiture.

(*o*) 1 Hallam, ch. 2.
(*oo*) 2 Bl. 56.

(*p*) 1 Hallam, ch. 2.
(*q*) *Ib.* Said to be the origin of the present Land-tax and Assessed Taxes
38 Geo III. c. 5 (now superseded by 5 & 6 Vict. c. 80) Inhabited House Duty
Management Act, 1890 (53 & 54 Vict. c. 44)

Intro. Part II.

portant features in the feudal system; they both involved an entire destruction of the original compact, and a return or 'reverter' of the lands to the lord.

The first, forfeiture, occurred whenever the tenant committed some act in violation of the duties which he owed to his lord; for instance, his taking upon himself to alien his feud without licence from his lord. His violation of duty was treated as a breach of his fidelity, rendering him unworthy any longer to hold his fief; which was thereupon resumed by the lord as forfeited. According to Blackstone (*qq*) there were three principal modes of alienation which gave rise to forfeiture, viz.:—

1. Alienation in mortmain, that is, alienation to a corporation.
2. Alienation to an alien.
3. Wrongful alienation by particular tenants, as if a tenant for his own life aliened by feoffment or fine for the life of another, or in tail, or in fee.

And, equivalent both in its nature and consequences to the last, the civil crime of disclaimer; as where a tenant neglected to render due services to his lord, and, on action brought to recover them, disclaimed to hold of his lord.

So completely did the principle of forfeiture on alienation maintain its ground even at a later period, that in the theory on which the laws of landed property were constructed in England it became a principle that, were a party having only a limited interest in property—as for instance, a mere tenant for life as distinguished from a tenant in fee, or a tenant for a term of years—to deal with the property on the footing of an absolute ownership, and purport to alienate it accordingly (the second instance of forfeiture on alienation referred to); this alienation, which operated 'by wrong' or 'tortiously' to confer the larger interest on the alienee, would be treated as a forfeiture by the tenant of his interest, and the land would revert to the person whose title was expectant on the termination of the tenant's interest. By the Real Property Amendment Act (*r*) it is now provided that a feoffment shall not have any tortious operation.

5. Escheat.

'Escheat' (*s*) is the determination of the tenure or dissolution

(*qq*) 2 Bl. bk. ii. ch. 18.

(*r*) 8 & 9 Vict. c. 106, s. 4.

(*s*) Ld. Coke says:—"*Escheata* is derived from the French word *eschier*, *quod est accidere*; for an escheat is a casual profit, *quod accidit domino ex eventu et ex inoperato*, which happeneth to the lord by chance and unlooked for."—Co. Litt. 92*b* (ed. by Thomas, vol. ii. p. 188).

of the natural bond between the lord and tenant, and took place where, the feud being one of hereditary descent, there occurred a failure of issue from the original stock; or, according to English law, when the capacity to inherit in any particular line of succession was cut off by reason of what was termed 'corruption of blood.' This happened as the result of any particular individual in the line of succession having committed, abetted, procured, or counselled some felony (in which were comprised all treasons), and being sentenced to death for it; he thereby became as it was termed 'attaint,' that is, the blood of the succession as it flowed through him became corrupt, and the succession was intercepted. In the days of internal struggle and commotion the fight or rebellion of the struggling against the dominant power was treated as treason; and, as struggle was frequent, so when unsuccessful was the charge of treason, and sentence to death for it. In cases of treason the Crown became entitled under the ancient Saxon law of forfeiture, but in other cases the lord of whom the estate was held became entitled under the feudal law of escheat, subject to the Crown's right of possession for a year and a day (*t*). Now forfeiture and escheat for treason and felony have been abolished by 33 & 34 Vict. c. 23:—

> S. 1. "No confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se*, shall cause any attainder or corruption of blood or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry."

6. Primer seisin (tenants of the king).

There was a particular 'relief' attaching to one particular kind of fief only, viz, one holden directly of the king, a charge known under the name of Primer Seisin—*prima seisina*. It existed in England only (*u*). It was expressly declared under Henry III. and Edward II. to belong to the king by prerogative (*x*). This did not apply to superior lords, but only to the direct tenants of the Crown. It was the right which the king had, on the death of any of his tenants of this class, to receive from the heir, if the lands were in immediate possession, a year's—if in reversion, expectant on some preceding estate for life, a half year's—profits of the lands. If the heir were under age, virtually the king had the

(*t*) 4 Bl. 381; and 2 Bl. 252.
(*u*) 1 Hallam, ch. 2.
(*x*) 2 Bl. 66.

Intro. Part II.

whole under the title of 'wardship,' until the heir could appear to claim it and receive investiture.

"Reliefs, fines upon alienation, and escheats," says Mr. Hallam (*y*), "seem to be natural reservations in the lord's bounty to his vassal. He had rights of another class which principally arose out of fealty, and intimate attachment. Such were the 'aids' which he was entitled to call for in certain prescribed circumstances. These depended a great deal upon local custom. . . . Of these, paying relief to his suzerain on taking possession of his land appears to have been the most usual in England; but these and other 'aids' occasionally exacted by the lords, were felt as a severe grievance, and by Magna Charta three only are retained; to make the lord's eldest son a knight, to marry his eldest daughter, and to redeem his person from prison. . . . In England and in Normandy, which either led the way to or adopted all these English institutions, the lord had the 'wardship' of his tenant during minority. By virtue of this right, he had both the care of his person and received to his own use the profits of the estate. . . . By a gross abuse of this custom in England, the right of guardianship in chivalry, or temporary possession of the lands, was assigned over to strangers. This was one of the most vexatious parts of our feudal tenures, and was never perhaps more sorely felt than in their last stage under the Tudor and Stuart families. Another right given to the lord by the Norman and English laws was that of 'marriage' (*z*), or of tendering a husband to his female wards while under age, whom they could not reject without forfeiting the value of the marriage; that is, as much as anyone would give to the guardian for such an alliance. This was afterwards extended to male wards, and became a very lucrative source of extortion to the Crown as well as to mesne lords."

7. Aids.

8. Wardship.

9. Marriage.

Allodial changes to feudal.

In course of time the feudal began to absorb the allodial system, and but little allodial tenure remained. In those days of struggle the allodialist found it safest to range himself under the banner of some powerful lord, who extended to him his protection in return for the consent of the allodialist to hold his lands as from himself, doing homage to his person, and rendering the usual fealty for them.

Tenements; Tenants; Tenure.

These feudal lands came to be called in England 'tenements,' the possessors were called 'tenants,' and their holding or possession a 'tenure.'

Tenure *in capite*.

Lord paramount.

Mesne lords.

Where lands were held of the sovereign the tenure was said to be *in capite* or in chief; they were holden of the Sovereign immediately. The king was styled Lord Paramount. But when such tenants granted out portions to inferior tenants by way of subinfeudation, they were called mesne or middle lords.

(*y*) Vol. i. ch. 2.

(*z*) Maritagium.

Such is the leading outline of the feudal system. If prevailing in England at all previously to the Norman invasion, which is doubtful, it prevailed only to a limited extent.

Before feudalism 'boc-land' and 'folkland.'

Lands, says Mr. Hallam, are commonly supposed to have been divided among the Anglo-Saxons into 'boc-land' and 'folk-land.' The former was held in full property, and might be conveyed by 'boc' or written grant: the latter was occupied by the common people, yielding rent or other service, and perhaps without any estate in the land but at the pleasure of the owner (*a*).

Feudalism in England.

The feudal system was fully introduced after the Conquest by the invaders from the Continent of Europe. Partly by fair means, partly by foul,—partly by the force and aggression of conquest under the subtle administration of the race of Norman lawyers whose efforts were directed to its introduction,—partly from the protection which it was found to afford to the smaller owners of the soil against the aggressions of larger or more powerful ones, it by degrees attracted to itself the greater portion of the soil of the country, and became the governing system. Long did it hold its sway in the jurisprudence of the country; and, although the system, as will hereafter appear, has since been abolished, to the present day not only do we find its traces, but it retains a considerable influence, in our Real Property Law. In some particular instances, indeed, the ancient local customs of the country had sufficient stubbornness to resist its application; but these were only exceptions to the general result. One prominent feature has all along been predominant in the theory on which our law of real property is based, and has survived the abolition of feudalism, namely, that all land belonging to any subject of the realm is holden of some superior, and that either mediately or immediately of the Crown (*b*).

Services:—Free, base. Certain, uncertain.

What has been sketched is the Feudal system in its broader and more comprehensive outline. As ultimately prevailing in England, the tenure thus created was distinguishable into separate classifications dependent on the Services under which it was held. The division of these Services was into Free and Base, Certain and Uncertain. The former expressed the quality of the services, the latter their quantity, and the time of exacting them.

A Free service had reference to the condition of the person rendering it. It was service such as a person of high degree, a

(*a*) 2 Hallam, ch. 8, pt. i. (*b*) 2 Bl. 51.

Intro. Part II.

Knight, or a Freeman, might yield without ruffle to his dignity—such as was not unbecoming the character of a soldier or a freeman to perform; as, for example, to serve under his lord in the war, to pay a sum of money, and the like. The Base services were of a servile nature, fit only for persons of inferior position—slaves of the soil, anciently termed 'villeins,' or the like; as, for instance, to plough the lord's land, make his hedges, or carry out the refuse, or other mean employment.

The Certain services were independent of the distinction of either Free or Base. The Certain were defined by the grant, and could not be exceeded on any pretence, as to pay a fixed annual rent, or plough a given field for a certain number of days. The Uncertain depended on contingencies undeclared, or indeed unknown—as to do military service in person when called upon, or to pay an assessment in lieu of it, or to wind a horn at the approach of an enemy—which were Free services; or to do whatever the lord should command, which would be a Base or Villein service (*c*).

III. Frank tenement. Villenage.

The division of services into Free and Base gave rise to the division of title into tenures or tenements—either (1), of Frank Tenement, or (2) of Villenage (*d*). The former was a holding of a 'frank' or freeman; the latter that of a 'villein.'

a. Frank tenement.
1. Knight service or in chivalry.
2. In free socage.

Frank tenements were again subdivided into tenancies by Knight Service, or as it was sometimes called, in Chivalry, and tenancies in Free Socage.

The former were those of which the services, if uncertain, were nevertheless honorable; and this was the ordinary military holding called *servitium militare* or *service de chivaler* (*e*). A tenancy in Free Socage was also that in which the service was of an honorable character; but it was defined, and nothing could be demanded beyond. Instead of being military, the personal services demanded of the tenant were mainly of an agricultural character, and the money payments were in the nature of rent or other fixed liability. Comparatively few lands were in ancient times the subject of this tenure, but now and since 12 Car. II. c. 24, it is the tenure by which the bulk of the land in this country is held under the term Freehold (*f*). Though 'wardship' and 'marriage' were incidents of this tenure, their nature was very different to those incidents

(*c*) 2 Bl. 60.
(*d*) 2 Bl. 61.
(*e*) 2 Bl. 62.
(*f*) 2 Bl. 78.

under Knight Service, and it was herein the Socage tenures had the advantage. The lord of the fee had not the 'wardship,' but the next of kin, to whom the inheritance could not descend, had the guardianship until the heir was fourteen, and then the heir could choose his own guardian until twenty-one (*g*); and if the guardian married his ward under fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing by it (*h*).

The term 'socage' has been referred sometimes to the Saxon word 'soc,' signifying a liberty or privilege, sometimes to the like word in French, signifying a plough-share. It was called 'free socage,' because the owners of such estates were freemen, not 'villeins' or slaves (*hh*).

1. Knight Service. Proper,—Improper. Grand serjeanty.

The tenancy in Knight Service then was originally the predominant tenure. It might be either what was called Proper, that is, Knight Service strictly speaking, or Improper.

The former was the ordinary military tenure, usually known by the name of Knight Service (*feodum militare*), or in chivalry; the latter was of a special kind designated tenure by Grand Serjeanty (*per magnum servitium*). It applied to the case of lands held direct from the Crown where the services to be rendered were not only honorary, but to be rendered by the tenant in his own proper person to the King; as, to carry the banner of the King, or his lance, or to be his marshal, or to carry his sword before him, or to be his butler, champion, or other officer at his coronation, or to do other like services, though he seems to have been exempted from a general attendance at his wars. None could hold by Grand Serjeanty but of the King only; and it was in most other respects like ordinary Knight Service, save that the tenant was released from some of its pecuniary burthens.

2. Free socage.

Tenancy in Free Socage existed not only in its ordinary shape but also comprised three particular varieties, which have been designated—(1), Petit Serjeanty; (2), Tenure in Burgage; and (3), Gavelkind (*i*).

Petit serjeanty.

Petit Serjeanty was where a man held his land of the King, to yield him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an

---

(*g*) 12 Car. II. c. 24, gave the father power to appoint a guardian by will.

(*h*) Litt. 5, 123; (ed. by Thomas, vol. i. p. 337.)

(*hh*) 2 Bl. 79.

(*i*) 2 Bl. 81.

Intro. Part II.

arrow, or other things appurtenant to war; the rent or render, like the service in Grand Serjeanty, tended to some purpose relative to the King's person (*k*).

Burgage.

Early in the history of the country there arose certain towns called Boroughs, exercising a local government and municipal privileges, existing, or, at least, holding their lands under particular grants, sometimes from the Crown and sometimes from other great lords of the soil, and at a stipulated rent. These lands were said to be held in Burgage. These tenures in the mode of their enjoyment were a good deal regulated by local and ancient custom (*kk*), of which the more prominent was that of 'Borough English' (as distinguished from the Norman customs); according to which, instead of lands descending to the eldest son on the death of the ancestor, they devolved on the youngest.

(Primogeniture.)

"The right of primogeniture in males," says the learned editor of Lord Coke's first Institute, "seems anciently to have obtained only among the Jews. The Greeks, Romans, Britons, and Saxons, and even originally the feudists divided the lands equally; some among all the children at large; some among the males only. But though upon the first introduction of hereditary succession in feuds they descended to all the sons, yet that course was afterwards changed in consequence of a Constitution of the Emperor Frederick. The doctrine of Primogeniture was first introduced into England by William the Conqueror. It appears from Glanvil, that in the reign of Henry II. estates held by military service descended to the eldest son only; and estates held in socage were partible among all the sons; and the right of Primogeniture seems to have been fully established in the reign of Henry III. in socage lands, as well as in lands held by knight service. As to the females, they are still left as they were by the ancient law; for, as they were all equally incapable of performing any military service, there could be no reason for preferring the eldest" (*l*).

And again, whereas in the case of dower, the more accustomed right of the wife was to a life interest in one-third only of the lands held by her husband, by the custom of Borough English she was endowed with a life estate in the whole. Further, though it was not, after the Conquest, until the reign of Henry VIII. that

(*k*) 2 Bl. 81.

(*kk*) See Bl. 83, for reasons of custom.

(*l*) Note by Thomas to Co. Litt. vol. ii. 174; and see 2 Bl. 214.

lands were generally devisable by will, custom from the earliest time had made lands in burgage devisable (*m*).

Gavelkind.

Tenure by Gavelkind occurs principally in Kent, though it is also found to some smaller extent in other localities. It is said to have survived by reason of the resistance of the Kentish men to the Norman Conqueror, or to concessions wrung from him, whereby the original inhabitants retained their prior and ancient customs. The great distinction of this tenure existed also in the matter of descent; lands on the death of the owner passing neither to the eldest nor to the youngest son, but to all together. As Littleton says, "it standeth with some reason, for every son is as great a gentleman as the eldest son is, and perchance will grow to greater honour and valour if he hath anything by his ancestors; or otherwise, peradventure, he would not increase so much" (*n*). The derivation of the word 'gavelkind' is said to be '*gyfe-eal-kyn*,' Saxon—that is 'given to all the kindred' (*o*). There were, however, other customs of which the principal were a right of alienation by an infant tenant at the age of fifteen (*p*); an exemption from escheat in the case of attainder, the maxim being, "The father to the bough, the son to the plough;" that is, if condign punishment,—that is to say, execution by hanging (the bough), overtook the father, the son should betake himself to his 'plough'; and a power of devising lands even before the statute 32 Henry VIII. (*q*).

b. Villenage.

1. Pure.

'Villenage' was originally of two sorts, the one being Pure Villenage and the other Villein Socage (*villenagium privilegiatum*). The former was when the tenant held on the terms of doing whatever was commanded of him, "nor," as it was said by the old text-writer, Bracton, "knows in the evening what is to be done in the morning, and is always bound to an uncertain service."

2. Villein socage.

The latter, 'villein socage,' was a species of privileged villenage. The services, though base, were certain; and the tenants could not be removed from the soil so long as they performed them.

(*m*) 2 Bl. 84.

(*n*) S. 210; ed by Thomas, vol. ii. 436.

(*o*) Wharton.

(*p*) A form of such charter of feoffment is given in 2 Da. i. 244. He says that "many manors and lands commonly supposed to be of gavelkind tenure were really held by knight's service, and are now of socage tenure. This fact and the circumstance that much gavelkind land has been disgavelled should induce great caution in accepting titles under a customary feoffment by an infant."

(*q*) 2 Bl. 85.

Intro. Part II.

Copyholds.

This tenure appears originally to have prevailed only among those who were the tenants of the king, and the cultivators of his demesnes, that is the lands reserved to himself for his personal enjoyment. In process of time, however, it extended to holders of lands acquired from other lords. Out of this holding there grew one which has long occupied a prominent place among tenures, and still survives under the name of Copyhold.

Manors.

Often the holder of some larger tract of land, while granting out to others, on terms of holding from himself as freehold tenants in perpetuity, such portions of the soil as he might desire thus to alienate, reserved a portion as a site on which to erect his mansion, with the necessary convenience of a portion of the surrounding lands (*r*). The portion thus retained was called his 'demesne' or 'domain'—*terræ dominicales* (those of the *dominus manerii*). Of this, part might be retained in the personal occupation of the lord for his domestic purposes; but of the rest part was usually turned over for cultivation to the class called 'villeins' (from *vilis* (*s*)), and the remainder was reserved as waste to afford pasturage, turbary, and so forth, to the lord or his tenants (who thus obtained rights of common, and were in reference to such rights called commoners), or to serve for the purpose of public roads, the waste being ordinarily the poor soil of the demesne. The whole was under the immediate dominion and government of the lord, and passed under the designation of his manor (*t*). The lord was not only a seignorial but a judicial functionary; for Courts were held under his presidency, as well for settling matters connected with the lands themselves, and the interests of the tenants in them, as for redressing the nuisances, misdemeanors, or petty offences within the manor. To these courts, in process of time, the tenants of the manor generally were summoned; and they were termed Courts Baron or Customary Courts—the Court Baron being the higher order of court, and attended by the freemen of the manor, the Customary Court by the villeins. In the former the freemen constituted the court itself or its judges; in the latter all was left to the arbitrament or judgment of the lord, or, in his absence, his steward, who was the

(*r*) 2 Bl. 90.

(*s*) Ld. Coke says *a villa, quia villæ adscriptus est*, 116*a* (ed. by Thomas, vol. i. 405).

(*t*) Ld. Coke says *a manendo*, because the owner resided there. The residence of the lord was called in French *manoir*. Co. Litt. 58*a* (see ed. by Thomas, vol. i. 204, n.). See 2 Bl. 90.

ministerial officer of the Court. If, as it sometimes happened, several of these manors were held under one great baron, or lord paramount, his seignory over the whole was termed an 'honor.' At a later period the judicial functions of the lord fell into disuse: but the Courts survived, as they have to the present day, for the transaction of the ordinary business connected with the holding; and, when they became transferable, for the transfer of the lands included in the manor (*u*).

At one period the villeins were bound to and occupants of, the soil—they, their children, and effects, belonging to the lord like the cattle or stock upon it. For such holding as they possessed they owed fealty to the lord. To copyhold were incident wardship and relief as in socage, escheat (but in case of treason to the lord not to the Crown), forfeiture and fines. But the most peculiar incident was the right of the lord on the death of the tenant to seize his best beast or other chattel under the name of a 'heriot'—a custom in some places still prevailing. The custom is supposed to be of Danish origin (*x*).

So entirely was the occupation by the permission only of the lord, and resumable at his pleasure, that the holding was said to be at the will of the lord, and so theoretically it remains even at the present day; but the will of the lord is to be interpreted by the custom of the manor.

By degrees, however, the position of the tenants improved. Permitted probably at first to cultivate and appropriate to themselves such small portions of land as might be needed for their own sustenance, they ultimately acquired a more assured interest therein, or acquired other and more extended gifts; while those who had been originally slaves, often came to acquire manumission, until the system of slavery became ultimately extinguished, and slavery resolved itself into freedom. Finally, nothing of their original villenage was left to them beyond the liability to the services under which they held their lands; so that by the time of Sir Edward Coke, who lived in the reign of Queen Elizabeth, he was able thus to describe their condition:—

"Now copyholders stand upon a sure ground; now they weigh not their lord's displeasure, they shake not at every sudden blast of wind;

(*u*) In the Conveyancing and Law of Property Act, 1881, 'manor' is defined as including lordship, and reputed manor or lordship.—44 & 45 Vict. c. 41, s. 2, ~~§ 4~~ (iv)

(*x*) See recent case of *Lord Zouche* v. *Dalbiac*, 10 L. R. Ex. 172.

Intro. Part II.

they eat, drink, and sleep securely, only having a special care of the main chance—namely, to perform carefully what duties and services soever their tenure doth exact, and custom doth require; then let lord frown, the copyholder cares not, knowing himself safe" (*y*).

The course of enjoyment varied according to the customs of different manors, which were governed a good deal by accidental circumstances—sometimes of local usage, sometimes dependent on the individual caprices or liability of the lord.

Rolls were kept of the holdings, the customs and other matters appertaining to the tenancies, or the affairs of the manor; and these were called its Court Rolls. In these were inscribed the names of the different tenants and their holdings. It was under these Rolls, or copies of them, that the holding existed, whence its name of Copyhold; and the tenant was said not only to hold at the will of the lord, but by copy of Court Roll, according to the custom of the manor, for custom is the life of copyholds (*z*).

Originally these grants were in every sense personal to the tenant, that is were neither alienable to others, nor transmissible to descendants on death, though they ultimately changed their character in both respects. Probably the first change was in the absolute grant of estates for life (*a*).

A copyholder ultimately came to acquire as good a title as a freeholder, save that on any change in the ownership, as a general rule (*b*), he who acquired the new ownership had to be admitted as tenant in the books or rolls of the manor before his ownership got recognised there.

Ancient demesne and customary freeholds.

Indeed, in some manors the holding was from the first so far of the nature of freehold, that the grant was not confined to the life of the tenant, but was a grant in perpetuity upon the terms only of yielding the accustomed services; and a tenant did not owe his holding to, nor was he described as holding at "the will of the lord," but simply "according to the custom of the manor" (*c*).

Tenancies of this description exhibited two varieties, namely, tenancies in Ancient Demesne (*cc*) and Customary Freeholds.

(*y*) Co. Cop. s. 9, Tr. p. 6.

(*z*) Co. Cop. s. 32, Tr. p. 58.

(*a*) Wms. 307.

(*b*) General, for tenants in ancient demesne did not hold of copy of Court roll.

(*c*) 2 Bl. 101.

(*cc*) According to Blackstone (2 B 98) the same as 'villein-socage' (*ante*, p. 29). They partook of the baseness o villenage in the nature of the services, and the freedom of socage in their cer tainty.

The former existed only in those manors which were in the hands of the Crown at the date of the Norman Conquest, and appeared in the great survey of the day, called Domesday. They were probably gifts to villeins who had been enfranchised, and were granted subject to certain services, as, to supply the king's Court with a certain quantity of provisions. The others are to be found in many parts of the kingdom. As in pure copyhold, the evidence of title is to be found on the Court Rolls (*d*).

Though no freehold can at the present day be converted into copyhold, all copyhold interest has long been convertible into one of absolute freehold by the act of enfranchisement on the part of the lord. "The Conveyancing and Law of Property Act, 1881," says Mr. Wolstenholme, "does not profess to touch customary or copyhold lands except where they can be dealt with as freeholds. It will probably be found convenient soon to extinguish all customary tenures" (*dd*).

Such is the general nature of tenure, and such the principal tenures established in England regulating the holding of lands.

Freeholds, Copyholds, Leaseholds.

Of the three tenures, viz. (1) in Knight Service, or Chivalry, (2) in Free Socage, and (3) in Copyhold, the two last only survive at the present day; and of immovable property the great division now is into freehold and copyhold, with the modification only that that which, being held for a term of years either longer or shorter, is termed leasehold.

IV. Subinfeudation abolished.

Break-up of feudal system.

The system of subinfeudation lasted only for a period of about 200 years from the original introduction of the feudal system in the time of William the Conqueror—namely, to the time of Edward I. (1290); when a statute was passed called 'The Statute of *Quia Emptores*' (*e*), which terminated it. The system of subinfeudation was found prejudicial to the interest of the chief lords, by exposing them to the frequent loss of their escheats, wardships, and marriages, for the immediate lord of the 'terre-tenant,' or him who occupied the land, had these advantages, and so they did not belong to the superior lord when any mesne lordship intervened (*ee*).

The statute derived the name of '*Quia Emptores*,' by which it has since been known, from the two Latin words with which it com-

(*d*) 2 Bl. 98–101; 1 St. Bl. 224.

(*dd*) The Conveyancing Acts, by Wolstenholme & Turner, note to 44 & 45 Vict. c. 41, s. 7 (5). See for further information about copyholds, Scriven's or Elton's Treatises.

(*e*) 18 Ed. I. c. 1.

(*ee*) 2 Bl. 91.

Intro. Part II.

mences. It directed that upon all sales or feoffments of lands in fee simple the feoffee (*f*) should hold the same, not of his immediate feoffor (*g*), but of the next lord paramount of whom such feoffor himself held, and by the same services: so that since that statute it has not been lawful to create a tenure of an estate in fee simple; therefore every lordship or seignory of an estate in fee simple bears date at least as far back as that reign. To this rule the few seignories, which may have been subsequently created by the king's tenants *in capite*, form the only exception (*h*).

The statute of Quia Emptores was the first great blow struck against the feudal system. It abolished subinfeudation, and gave greater facilities to tenants of alienating part of their lands. The feudal system was in its basis a military one. The nation, however, by degrees began more to cultivate the arts of peace, and though never losing their military renown, yet still began to devote themselves to agriculture, to trade, and to commerce, rather than to war. The result was increasing opulence on the part of the body of the people, and diminishing aptitude of the feudal system to the condition of the community.

In the meanwhile the services awarded in its inception by the feudal system, sank into mere money payments, or 'scutages,' which, though they remained as burthens on the land, failed to afford in return the protection of that feudal body of soldiers which it was one of the objects of the system originally to provide; and these burthens, from the weight with which they fell, and the oppressiveness of their exaction, became the subject of loud and persevering complaints on the part of the great lords and others who had to bear them. Such a state of things was not calculated to last: and various palliatives were from time to time afforded by successive Acts of Parliament; a final blow was given to the system by a statute on the restoration of Charles II. (*i*), by which the whole system of military tenure, in other words tenure in chivalry, with all its burthensome appendages, was swept away. That statute enacted that all sorts of tenures held of the king or others be turned into free and common socage, save only tenures

---

(*f*) *i.e.*, the person to whom they were conveyed.

(*g*) *i.e.*, the person who conveyed them.

(*h*) Wms. 127. At p. 62, Mr. J. Williams said the statute Quia Emptores did not extend to those who held by the king as tenants *in capite*; but *contra*, see 1 St. Bl. 234, note.

(*i*) 12 Car. II. c. 24.

in frankalmoign (*j*), copyholds, and the honorary services (without the slavish part) of grand serjeanty (*k*).

Thus perished the feudal system in England so far as regarded the tenure in chivalry at least, with the single exception of the honorary portion of the services involved in the tenure by 'grand serjeanty.' The statute converted that which did not survive as copyhold or frankalmoign into the tenure of 'free and common socage,' discharged of those heavier burthens to which the tenure by knight service was subject—homage, wardships, values, forfeiture, marriage, aids for marrying the lord's daughter, making the son a knight, and so forth. Even the rents originally reserved upon them either resolved themselves into payments called 'quit rents,' which, in the change in the value of money in later years, have become almost nominal, even when subsisting; or, what has for the most part happened, were lost in the lapse of time and the change of circumstances; and practically the whole freehold land of the country is now held by its possessors with scarce a vestige of its original burthen, without even a rent reserved payable in respect of them. Says Mr. J. Williams:—

"A small occasional quit rent with its accompanying relief (*kk*), suit of the Court baron (*l*), if any such exists, an oath of fealty never exacted, and a right of escheat seldom accruing, are now, it appears, the ordinary incidents of the tenure of an estate in fee simple" (*m*).

The theory, however, still continues, that to the Crown belongs the ultimate title to the soil as lord paramount; but this practically can only come into operation in cases of escheat, as where a tenant in fee simple dies intestate without there being any one who can succeed to the estate as heir, or of a bastard dying without sons or lineal descendants and without having made his will.

The tenures described are of a lay nature. There remains to be noticed one of a spiritual nature, viz., tenure in Frankalmoign, which we have seen was excepted from the operation of the statute of Charles II.

V. Frankalmoign.

'Frankalmoign,' sometimes called tenure in Free Alms, was a tenure of an ecclesiastical or pious character, and had reference to the lands either of the Church, or of some charitable foundation.

(*j*) *Infra.*

(*k*) 2 Bl. 81.

(*kk*) That is, of one year's quit rent payable by the heir on the death of his ancestor.

(*l*) *i.e.*, of any manor now existing.

(*m*) Wms. 127.

Intro. Part II.

In the earlier history of the country, grants in the nature of subinfeudation were accustomed to be made by the owners of land, sometimes to an ecclesiastical body for the purposes of the Church, sometimes to some other permanent body by way of alms, as a provision for the poor. No services were required of the donees under the grants beyond those of a spiritual nature, such as praying for the soul of the donor or founder, his family or heirs: and even this was matter more of spiritual obligation than temporal security; and fealty, which was incident to all other services, was not rendered for the land,—as Littleton says (*n*), "Because divine service is better for the grantor or feoffor and his heirs before God than any doing of fealty." In fact it was not to the lord or his descendants or other representatives, but to the spiritual authorities only that any responsibility existed, even for the offering up of the prescribed prayers. And the grants being made in perpetuity the donees practically acquired an ownership subject to such discharge of the religious duties as conscience might prescribe, or the ecclesiastical authorities might interfere to enforce. This tenure, as Mr. J. Williams says (*o*), is a very near approach to that absolute dominion on the part of the tenant which yet in theory the law never allows.

Down to the time of the statute of Quia Emptores, tenures of this description could be created by any donor of land. But that statute having, as we have seen, abolished all subinfeudation, from that time forth such grants could only proceed from the Sovereign (*p*). Some, however, of these foundations still subsist to the present day, and by it lands of the Church are now for the most part held (*q*): but the religion of the country having undergone a change since the date of their original creation, the religious services under which they are held have been subjected to a corresponding modification.

Frank marriage.

There remains to mention a tenure now obsolete,—tenure, namely, in Frank Marriage. It arose in case of a marriage of a daughter, and took place in the instance of a gift to her and her husband, and the heirs of their two bodies, free from all manner of service to the donor or his heirs, until the fourth degree of consanguinity from the donor was passed, the oath of fealty only

(*n*) S. 135, Co. Litt., ed. by Thomas, vol. i. p. 352.
(*o*) Wms. 131.
(*p*) 2 Bl. 102, quoting Litt. s. 140.
(*q*) Wms. 131; 1 St. Bl. 225, and note.

excepted. This ~~whimsical sort of~~ tenure has, ~~however,~~ now long become obsolete. From it, however, was borrowed the law of 'hotchpot' in the statute for the distribution of the personal estates of intestates (*r*). Says Littleton (*s*):—

"As if a man seised of certain lands in fee-simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frank-marriage, and dieth seised of the remnant, the which remnant is of a greater yearly value than the lands given in frank-marriage.

"In this case neither the husband, nor wife, shall have anything for their purparty of the said remnant, unless they will put their lands given in frank-marriage in 'hotch-pot,' with the remnant of the land with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself.

"And it seemeth that this word (hotch-pot) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behoveth in this case to put the lands given in frank-marriage with the other lands in hotch-pot, if the husband and wife will have any part in the other lands."

(*r*) 22 & 23 Car. II. c. 3, s. 25; see 2 Bl. 191.

(*s*) Litt. ss. 266, 267; Co. Litt., ed. by Thomas, vol. i. pp. 720–721.

Chap. I.

CHAPTER I.

ESTATES FOR LIFE.

I. Estate—what.

FROM the above Introduction we at once proceed to consider the varying interests or quantity of ownership which may be had in Real Property.

By the term 'interest' is meant that amount of ownership which the law recognises as conferring, what is technically termed, an 'estate' in its subject-matter. Absolute ownership in lands no one except the sovereign can have; one can have only an estate. All the land in the kingdom is the subject of tenure; and, if the estate is not held of any subject, at any rate it must be held of the Crown.

No estate in personalty.

Property, as we have seen, is divided into two great classifications of real and personal; but, if we except the particular species of personalty called a chattel real, to real and not to personal property is ascribed what is designated an 'estate.' Personal property is essentially the subject of absolute ownership, and ordinarily speaking cannot be held for any estate; in matters which could be acquired by manual occupation, as a house, a bushel of corn, money, or the like, it was possession alone which was treated as creating a legal interest. Thus a chattel and the legal right to it passed by delivery, and by delivery only; and the duration of the possession was the limit of the ownership. This state of the law respecting ownership prevails to the present day; and if it be sought to introduce limitations in the nature of settlement into a gift of any ordinary chattel or personal property, the only course to be pursued is to transfer it to trustees, and by a declaration of trust define the ownership. Thus, were one to desire to create a succession of interest, in a matter of even such apparently permanent property as stock in the Public Funds, and in such a way as to limit it, on the occasion of a marriage, to parents for life, and after their death to their children, the course would be to transfer the funds into the names of trustees in the Bank-books, and then direct the trustees to hold them for the objects desired. Interest of the parents and the children there

would be none, so far as regarded the actual legal ownership of the stock and power of transfer.

Quantity of—duration. Quality of—mode of enjoyment.

The different interests which may be had in real property may be considered with reference to the time of their continuance, and with reference to the mode of their enjoyment. The former is termed the Quantity of the estate, the latter its Quality. As regards time of continuance, or duration, the interest may be one which is to subsist only for a certain and restricted period; for example, the life of an individual, or a particular term of years; or it may belong to the holder and his heirs for ever. As regards mode of enjoyment, the whole estate may be vested in one individual, or, what the law terms, be held 'in severalty'; or it may be vested in a plurality of holders 'jointly,' or 'in common,' or 'in coparcenary.'

Estates in freeholds.

We will first consider the nature of the estates which may be had in lands of free tenure or freehold (*a*), and then leaseholds or chattels real, or, as they are sometimes called, 'less than freehold.' A freehold estate may be for life only, or be one of inheritance, that is, in tail or in fee.

II. Estate for life.

First, as to an estate for life. This is an estate held, or capable of being held, during the subsistence of a life or lives, and for a freehold interest. It is one capable of being held, as well as one held, because an estate which, though subject to earlier determination, possesses the capability of enduring for life, is measured by the latter quality rather than the former, and is treated as an estate for life. Thus, an estate in dower, vesting in a widow, was said to be an estate for life, even when (as it still is, in gavelkind) it was in fact one for widowhood only, and determinable accordingly on a second marriage (*b*). And so it is if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during coverture (*bb*).

Also an estate granted to a man for his life generally may determine even in his lifetime, that is, by his civil death, as, for instance, formerly were he to enter into a monastery and be "pro-

(*a*) As distinguished from those held in base tenure, or copyholds.

(*b*) "It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind; viz., a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I. this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it." (2 Bl. 133.)

(*bb*) See 1 Wms. on Exors. pt. ii. bk. ii. ch. i. § 1, quoting Co. Litt. 42*a*.

Chap. I.

fessed in religion." Now forfeiture can occur only by outlawry (*c*), or where, in case of crime, a defendant cannot be arrested on a *capias* or bench warrant (*d*). Hence in the creation of estates of this nature, *e.g.*, in settlements, it was usual at one time (indeed, the practice still prevails to some extent), to adopt the form of limiting the interest to the party for his natural life (*dd*).

Cestui que vie.

The life for which the estate is held may be either that of the party himself to whom the grant is made, or it may be the life of some other party, or even a plurality of lives. For example, the limitation may be to A. for his life, or to A. for the life of B., or for the lives of B., C., and D., or for the life or lives of B., C., or D. In any of the latter cases, the life or lives, on which the existence of the grant is dependent, is or are called the *cestui que vie* or *cestuis que vie*.

Now an estate or interest for the life of the grantee is, as has been pointed out (*e*), the extent of the ownership, which was originally the subject of grant made to another by any lord of the soil. It was not until feuds had begun to prevail more extensively that the interest of the tenant under a grant came to be either of so absolute a character as to be either descendible to his heirs, or capable of alienation. The right of every freeman to sell at his own pleasure was recognised by 18 Ed. I. c. 1 (*Quia Emptores*). The power of testamentary (*f*) alienation was given as to estates in fee simple by 32 Hen. VIII. c. 1, and as to estates held for the life of another by 29 Car. II. c. 3, s. 12 (*g*). Any estate, however, conferred on a party for life, has from a very early period of the English law of property been recognised as constituting an estate of freehold (*h*).

So completely has the theory that nothing short of an actual

(*c*) A proceeding adopted against a defendant who has absconded and cannot be found after judgment (outlawry on mesne process was abolished by the Common Law Procedure Act, 1852—15 & 16 Vict. c. 76, s. 24).

(*d*) Law Lexicon and Petersdorff's Abridgment.

(*dd*) See form in 2 Crabb, 1371, but not so in 3 Da. pt. ii. 984, or 2 Prid. 278.

(*e*) *Ante*, p. 18.

(*f*) *i.e.*, by Will.

(*g*) *i.e.*, the Statute of Frauds.

(*h*) According to Mr. J. Williams, it acquired this character from its being the lowest order of estate which a tenant would accept as a return for the feudal services required of him—that is, the lowest worth his acceptance. (R. P. 22.) But according to Hallam (vol. ii. ch. 8) it is uncertain whether when feuds were first granted they were not revocable at pleasure. Blackstone (vol. ii. 104) says freehold "is such an estate in lands as is conveyed by livery of seisin. . . As therefore estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold, and as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates."

estate limited to the grantee for life constitutes an estate of freehold been retained even to the present day, that suppose a long term of years, longer than any probable duration of life, were granted to an individual, but determinable on his death—say, for example, a term of 99 or even 500 years to A., if A. should so long live,—still this would be regarded not as an estate of freehold in the grantee, but one for a chattel interest only, and constituting personal and not freehold property. Yet practically it would be difficult, as regarded the actual quantum of interest, to draw much distinction between an ownership created in the form of a grant to an individual for his life, and one granted to him for a term of years which was to cease on his death.

Gift to A. B.

As just noticed, the life of the tenant was originally the extent of the feudal grant. Popularly, perhaps, it might be inferred, that, were one in terms to give an estate to another, even without the addition of words indicative of an intention to extend the gift to his descendants—for example, to A. B. simply, instead of to A. B. and his heirs, A. B. would take an estate absolutely; and so it would be if instead of land the subject of gift were some movable chattel or subject of personal property, as a horse, a sum of money, or even a lease for years in land itself. But it would be a misconception to suppose this with respect to land. The feudal grant having been in its origin at most for life only, the actual extension in terms to the heirs became necessary whenever it was sought to expand the nature of the grant, so as to confer a descendible interest on the tenant. Hence in any feudal grant, in the absence of words of inheritance, that is, of the introduction of terms of 'limitation,' as it is called, to the heirs, it was understood to have been the intention to have limited the interest to one for life only; and when grants of this nature came to be subjected to the exposition of the Courts, it was this construction which was adopted, and a grant to A. was held to confer on A. this restricted interest only. In the case of estates created by deeds, this principle of construction prevails to the present day; and a limitation by deed simply to A. would confer on A. no greater estate than for his life; and that notwithstanding the maxim that every grant is to be construed most strongly against the grantor, unless in the case of grants by the Crown (*i*). Even in the case of Wills also,

(*i*) 2 Bl. 121. The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, makes no alteration as regards the limitation of life estates.

Chap. I.

which were more plastic and yielding in their construction, unless an opposite intention was manifestly made out on the context, the like construction prevailed down to the Wills Act in the present reign (*k*). But this statute, in the absence of context to the contrary, has, so far as regards testamentary disposition, reversed the presumption of intention, enacting:—

> S. 28. "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention shall appear by the Will."

But while the law on the one hand (subject to the exception in testamentary cases), in the absence of words of inheritance, restricts to an ownership for life the estate granted; on the other hand, in the instance of the want of expression actually defining the ownership to be for life, as in the case where the grant is general only, it implies the intention to assure to the party at all events an interest of not less than that amount, in case the grantor hath authority to make such a grant. And this by reason of the maxim referred to just now, namely, that every grant is to be construed most strongly against the grantor; for an estate for a man's own life is considered more beneficial and of a higher nature than an estate for any other life (*l*).

How created.

So completely did the law assign to an estate for life a freehold character, that it could only be created or transferred by the class of assurances adapted to the creation or transmission of freeholds and freehold interests, a fact to which reference has already been made. The nature of this class of assurance will be more fully considered in a future chapter (*m*).

Pur autre vie.

The ordinary estate for life, then, is that granted to a person for his own life. But, as pointed out above, the ownership may be conferred for the life of another, and this may take place either by the original grant, or where a party being himself tenant for life, only conveys to another the estate granted to himself, the interest acquired by the second grantee being limited to the duration of the life of the original one. In these instances, the estate is described as being held *pur autre vie*, that is to say, for the life of another.

One singular anomaly grew out of, and was occasionally found

(*k*) 1 Vict. c. 26, s. 28.
(*l*) 2 Bl. 121.
(*m*) See p. 20, and note on p. 40, and chap. x.

attendant on the creation of an ownership of this description. Supposing the interest limited to the individual tenant did not in terms extend his ownership beyond his own individual life, were his life to drop before that of the life (or, as it might be, lives) for which the estate had been granted out, there would be an obvious hiatus or gap in the tenancy. Thus, suppose A., being a tenant for his own life, to assign his estate to B. for B.'s life, and without any limitation extending the estate of B. to his representatives, were B. to die during the life of A., B.'s estate terminating by his death, there would be no person entitled to succeed to the property under the grant. A. having parted with his life estate would have shut himself out from all interest, and consequently from all right of re-entry; while B. taking only for his own life, there would be nobody entitled to claim through representation to him. The possession, or at least the right to it, would therefore become vacant, and the first fortunate party who entered would have been entitled to retain this possession during the life of the *cestui que vie*, or the life on which the estate was held. To a possession thus acquired, the law assigned the title of a General Occupancy, and the party obtaining it was styled a General Occupant; and he would have been entitled to the estate for his own benefit, and not accountable for it to the representatives of A. To a certain extent, such an emergence or mischief might have been remedied by the extension of the limitation to the representatives of the party. Thus, for example, in the case put of the alienation by the tenant for life, if instead of confining the limitation to B., it had been to B. and his heirs, or to B. and his executors (*n*), the estate upon the death of B. would have been descendible, in the former instance, on his heirs, and in the latter on his executors, for the whole period for which it had been granted to A., namely, for the whole duration of A.'s life, in like manner as any ordinary estate would have descended. The difference only would have been in name, the heir or, as the case might be, the executor, being termed a Special Occupant, in contradistinction to the other species of occupancy pointed out, namely, a general one. Still even the power of extension to the heir or executor in the limitation would be but a partial remedy. In the first place, words of descent might, notwithstanding this power, have been omitted; and the introduction of them would

General occupant.

Special occupant.

(*n*) 1 Vict. c. 26, s. 6.

Chap. I.

neither have left the estate disposable by the owner after his death, nor subjected it in the hands of his representatives to his debts (*o*). Among the grievances to remove which the celebrated Statute of Frauds (*p*) was addressed, this formed one. Power was given to the holder to dispose of the estate by Will, and it was made liable to his debts in the hands of his representatives; and in case there should be no special occupant, the estate was made to descend to the executors or administrators of the party who had the estate (*q*). The provisions of that statute are the basis of the existing provisions of the Wills Act. That Act (*r*) extends the power given to every person to devise, bequeath, or dispose by will to estates *pur autre vie*, whether there shall or shall not be any special occupant. And it enacts:—

> S. 6. "That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent (*t*), as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Thus the general occupant was got rid of, and the estate was liable to the deceased holder's debts, into whosesoever hands it came.

A question has arisen upon the construction of this enactment in case of an estate being given to A. and his heirs for the life of B., and A. devised the residue of the estate to C. and his assigns, and C. died intestate, but having heirs—or to trustees in trust for D., his heirs, executors, administrators, and assigns, and D. died without heirs (being illegitimate, and unmarried, and intestate): to whom did the devised estates respectively pass on the deaths of C. and D. respectively? It was decided, in both cases, that they passed

---

(*o*) *Semble*, because he was in as special occupant, and not as heir.

(*p*) 29 Car. II. c. 3, s. 12.

(*q*) *Doe* v. *Lewis*, 9 M. & W. 664.

(*r*) 1 Vict. c. 26, s. 3.

(*t*) "The lands descended were called 'assets by descent,' from the French wor *assez*, 'enough,' because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor."—Wms. 80, referring to 2 Bl. 243.

to the personal representative of C. and D. respectively, though in the latter case he would be the nominee of the Crown (*u*). There remains to be noticed the Statute 6 Anne, c. 18. This was passed to prevent the death of the *cestui que vie* being concealed, and enables anyone claiming to be entitled after his death to obtain from the Lord Chancellor an order for his production; and if he is not produced, he is to be taken as dead (*x*).

Alienation.

A tenant for life, of whatever description, has the like power of alienation over his estate as the holder of one of a higher interest, though limited of course to the duration of the estate itself—that is, the subsistence of the life or lives for which it is held. For this period he may lease, mortgage, or sell it at his own volition, and it is subject in his hands to be taken in execution for his debts, and on his bankruptcy will pass to the trustee. His own interest, however, must of course be the limit of his alienation.

Conveyance tortious.

Under the feudal system, any attempt on the part of the tenant to assert a higher interest than for his life, that is, any attempted conveyance of it by him as in the nature of a conveyance in fee, would, as we have seen (*y*), have operated as a forfeiture of the estate itself. That is to say, such would have been the result under a feoffment which would have operated by wrong, or, as it was termed, had a tortious operation; but not under the mode of conveyance by lease and release introduced after the Statute of Uses (*z*), for a release never operated by wrong, but simply passed that which might be lawfully conveyed: therefore a conveyance by lease and release was said to be an innocent conveyance (*a*). The reason of the difference was that in the former case there was an actual entry by the tenant, a transfer of the seisin, but there was not in the latter. The same rule applied to a deed of grant (*b*). This will more plainly appear when we come to the subject of Conveyances (*bb*). As already noticed, it was enacted by the Act to Amend the Law of Real Property (*c*),

—innocent.

(*u*) This was decided in *Doe* v. *Lewis*, 9 M. & W. 662, contrary to *Wall* v. *Byrne* (*per* Ld. St. Leonards), 2 Jo. & Lat. 118; and in *Reynolds* v. *Wright*, 25 Beav. 100 (on appeal, 2 De G. F. & J. 590, *per* Ld. Campbell, L.C.), in which *Doe* v. *Lewis* was followed. In *Reynolds* v. *Wright* it was further decided that the enactment applied as well to equitable as to legal estates, the distinction between which will be explained hereafter.

(*x*) See s. 58 (1) of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), as to covenants relating to land devolving on the heir as special occupant.

(*y*) *Ante*, p. 22.

(*z*) 27 Hen. VIII. c. 10.

(*a*) Litt. s. 600, see ed. by Thomas, vol. iii. p. 124, note.

(*b*) Co. Litt. 328*a*, *ib.*

(*bb*) Chap. x.

(*c*) 8 & 9 Vict. c. 106, s. 4; *ante*, p. 23.

Chap. I.

that a feoffment made after 1st October, 1845, shall not have any tortious operation.

Emblements.

In some special instances, a qualified interest in the tenant is extended even beyond his own life. It has been already explained (*d*) what are Emblements, and it will be remembered that in the case of a tenant for life sowing the land, but dying before harvest, his executors have a right to the crop as a return to the tenant for his outlay. Nor is this right to emblements confined to the case in which the life on which the holding is dependent is that of the tenant himself. It exists (as modified by the statute about to be mentioned) in the case in which he is tenant for the life of another tenant, *pur autre vie*. Were the *cestui que vie*, or person on whose life the term was held, to die after the corn was sown, the tenant *pur autre vie* would have been entitled to the harvest.

That which applies to the tenant applies also to the under-tenant, and even to a greater extent; for if the life estate should determine by the tenant's own act, as by the marriage of a widow holding during widowhood, the tenant would have no right; but her act is not to deprive the under-tenant, who could not prevent it (*e*).

Apportionment of rent.

In 1851, "to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom," an Act was passed (*f*), by which it was provided that on the determination of leases or tenancies held by tenants at rack-rent under a tenant for life or for any other uncertain interest, instead of being entitled to emblements, the tenant should continue to hold on the same terms to the end of the current year of his tenancy.

In consequence of the determination of the estate of the tenant for life immediately on his death, if he had let the lands and died between two rent-days, there was no one to whom the under-tenant was liable to pay rent; in other words, at Common Law rent was not apportionable. To remedy some of the mischiefs and inconveniences thereby arising, various statutes have been passed, commencing with one in 4 Geo. II. (c. 19), and in 1870 the Apportionment Act was passed (*g*). Thenceforth all rents (whether reserved or made payable under an instrument in

(*d*) *Ante*, p. 10.
(*e*) 2 Bl. 123.
(*f*) 14 & 15 Vict. c. 25.
(*g*) 33 & 34 Vict. c. 35, ss. 2 and 7. See *Swansea Bank* v. *Thomas*, L. R. 4 Ex. D. 94, and *Constable* v *Constable*, L. R. 11 Ch. D. 681.

writing or otherwise) shall, unless expressly stipulated that no apportionment shall take place, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. Chap. I.

Waste.

"Every tenant for life," says Blackstone (*h*), "unless restrained by covenant or agreement, may (*i*) of common right take upon the land demised to him reasonable 'estovers' or 'botes,' for he hath a right to the full enjoyment and use of the land and all its profits during his estate therein."

'Estovers,' from *estoffer*, to furnish, is a liberty of taking necessary wood for the use or furniture of a house or farm; and 'bote' is a Saxon word of the same signification. But a tenant for life must not do, or suffer to be done, anything which may be destructive of, or otherwise injurious to, the inheritance—that is, to the substance of the property entrusted to his possession. This, in technical language, is termed 'committing Waste'; it may be of two characters, Voluntary or Permissive.

a. Voluntary.

Voluntary Waste consists in such acts as are destructive of the premises themselves, for instance, pulling down buildings, cutting down timber, ploughing up ancient meadow-land, opening mines for the procuring from underneath the surface coal or other mineral—or even digging for gravel, brick, or stone. Mines, however, already opened, may be continued to be worked, and clay, gravel, &c., may be dug out of pits already open (*k*). Alderson, B., said:—

"The principle upon which Waste depends is well stated in the case of *Lord Darcy* v. *Askwith*, thus:—'It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of park, for then it ceaseth to be a park; nor he may not destroy the stock or breed of anything, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, or the like.' Thus, the destruction of germins, or young plants destined to become trees (*l*), which destroys the future timber is Waste, the cutting of apple-trees in a garden or orchard, or the cutting down a hedge of thorns (*m*), which changes the nature of the thing demised, or the eradicating or unseasonable cutting of white-thorns (*n*), which destroys the future growth, are all acts of Waste. On the other hand,

(*h*) Vol. ii. 122.
(*i*) Like other tenants: 2 Bl. 35.
(*k*) *Viner* v. *Vaughan*, 2 Bea. 466. Further, as to what is 'voluntary' or 'positive' waste, and what is not, see *Phillips* v. *Smith*, 14 M. & W. 589.
(*l*) Co. Litt. 53*a*.
(*m*) *Ib.*
(*n*) Vin. Abr. "Waste" (E.).

Chap. I.

those acts are not Waste which, as Richardson, C.J., in *Barrett* v. *Barrett*, says, are not prejudicial to the inheritance; as, in that case, the cutting of sallows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber either by general law or particular local custom. So, likewise, cutting even of oaks or ashes where they are of seasonable wood—*i.e.*, where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not Waste" (*o*).

Timber.

'Timber' is wood felled for building or such like use. Oak, ash, and elm, are timber trees in all places; what else are, depends on the local custom: in some places, beech and whitethorn are (*p*).

When timber was going to decay, as by reason of its standing too thickly in the woods and plantations, the Court of Chancery, on the application of the tenant for life, would order it to be cut down and sold, and give the interest of the money to the tenant for life (*q*).

In a recent case (*r*) Jessel, M.R., thus states the law as to what the tenant for life may cut and what he may not:—

"As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England; and, secondly, on the special custom of a locality.

"By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text-writer (*s*), to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees are considered timber in peculiar localities—in addition to the ordinary timber trees. Then, again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for Waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally

(*o*) *Phillips* v. *Smith*, 14 M. & W. 593.

(*p*) Co. Litt. 53*a*, ed. by Thomas, vol. iii. 238.

(*q*) *Tooker* v. *Annesley*, 5 Sim. 235. See now Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35, and *post*, p. 49.

(*r*) *Honywood* v. *Honywood*, L. R. 18 Eq. 309.

(*s*) Gibbons on Dilapidations, p. 215.

by modern authorities in favour of the owners of timber estates—that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. . . . .

"The next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks and various exceptions of that kind; but, with those exceptions, which are Waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits Waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not Waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down."

Further, by the Leases and Sales of Settled Estates Act (*t*), power was given to the Court of Chancery, if it should deem it proper and consistent with a due regard for the interests of all parties, to sell the whole or any part of any timber (not being ornamental timber) growing on any settled estates. This is re-enacted in the Settled Estates Act, 1877 (*u*), which repeals all the preceding Acts. And more recently, the Settled Land Act, 1882 (*x*), has empowered the tenant for life (*y*) impeachable for waste—that is, not having the legal right to cut timber—on obtaining the consent of the trustees of the settlement or an order of the Court, to cut and sell timber ripe for cutting; and three-fourths of the proceeds are to be set aside as capital, and the other fourth to go as rents and profits.

b. Permissive.

Permissive Waste consists in that passive line of conduct which

(*t*) 19 & 20 Vict. c. 120, s. 11.

(*u*) 40 & 41 Vict. c. 18, s. 16; as to application of proceeds, see s. 34, and Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32. Under the former Act applications to the Court must be by petition (s. 23); under the latter Act all applications may be by summons in chambers (rule 2).

(*x*) 45 & 46 Vict. c. 38, s. 35; and see s. 11.

(*y*) S. 2 (5), (6), (7), and ss. 58—62.

Chap. I.

permits decay, rather than be at the trouble or cost of preventing it; as, for example, the suffering of the buildings about the premises to fall into ruin.

A recent case (*z*) occurred in which damages were obtained by the devisee in fee of premises for their non-repair against the executor of the devisee for life of the same, on the ground of Permissive Waste, the will requiring that such tenant should keep them in repair. The facts are shortly stated in the judgment of the Court, which contains all the learning upon the subject, and was delivered by Lush, J.:—

"The action is brought by the reversioner against the executor of a tenant for life, for Permissive Waste by the non-repair of some houses which had been devised to the wife of the testator for life with remainder to the plaintiff in fee.

"The devise was to the wife for her separate use during her life, "she keeping the houses in repair." She entered into possession on the death of her husband, and enjoyed the property for several years, but neglected to keep the houses in repair, and after her death the plaintiff entered and did the necessary repairs. This action is brought to recover out of her personal estate the expenses he has so incurred. It is remarkable that no direct authority is to be found for a case which must, we should suppose, have frequently occurred, and that we have to go back to first principles in order to find a solution of the question raised.

"Before the Statutes of Marlbridge (*a*) and of Gloucester (*b*), an action for Waste lay against a tenant in dower and tenant by the curtesy; but none against a tenant for life or years. The reason was, as stated by Coke, in 2 Inst. 300, "for that the law created their estates and interests, therefore the law gave against them a remedy: but tenant for life or years came in by demise and lease of the owner of the land, &c., and therefore he might in his demise have provided against the doing of Waste by his lessee, and if he did not, it was his negligence and default."

"Here it is plainly implied that, where the grantor in his grant provides against the doing of Waste, the grantee will be liable for Waste in like manner as a tenant in dower or by curtesy was liable, and this is in perfect accordance with legal principle as expressed by the maxims, "*Qui sentit commodum, sentire debet et onus et transit terra cum onere*" (*bb*). The first of these maxims has a very wide application in our law (*c*).

"The Statute of Marlbridge, c. 23, extended the common law liability by ordaining that "fermors during their term shall not make Waste, sale, nor exile of house, woods, or men, nor of anything belonging to the tenements that they have to ferm without special licence had by writing of covenant making mention that they may do it, which if they do and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

(*z*) *Woodhouse* v. *Walker*, L. R. 5 Q. B. D. 404.

(*a*) 52 Hen. III.

(*b*) 6 Edw. I. c. 5.

(*bb*) Co. Litt. 231*a*, and see *per* Holroyd, J., in *Burnett* v. *Lynch*, 5 B. & C. 607.

(*c*) See Broom's Maxims.

"The term 'fermors' here, says Coke (*d*), comprehended all who held by lease for life or lives, or for years by deed or without deed, and the words "'do or make Waste' in legal understanding in this place (as well as in the Statute of Gloucester) includes as well Permissive Waste, which is Waste by reason of omission or not doing, as for want of reparation, as Waste by reason of commission, as to cut down timber trees or prostrate houses and the like: for he that suffereth a house to decay which he ought to repair doth the Waste."

"The 'special licence' mentioned in the Statute of Marlbridge is commonly expressed by the well-known phrase 'without impeachment of Waste' (*dd*).

"The Statute of Gloucester gives, as a more stringent remedy, a writ of Waste, under which the tenant was liable to forfeiture of the thing wasted and treble damages.

"The right of action against a tenant for life belongs to the owner in fee of the immediate reversion.

"In course of time an action on the case founded on the Statute of Westminster 2, came to be substituted for the writ of Waste, as being a more simple and practical remedy, and the writ of Waste having fallen into disuse was ultimately abolished by 3 & 4 Wm. IV. c. 27, s. 36. But the rights and liabilities of the parties remained as before, the remedy only being changed (*e*). It is not necessary in this case to enter into the question whether an action on the case for Permissive Waste can be maintained against a tenant for life or years, upon whom no express duty to repair is imposed by the instrument which creates the estate. The modern authorities, or rather the dicta upon this point, appear to be strangely in conflict with the ancient reading of the statutes (*ee*).

"We think it must be held upon the principle before mentioned, that in this case the tenant for life was liable at common law, and that the plaintiff as immediate reversioner had a right of action, and probably might have obtained an injunction against her for the Permitted Waste, if he had made such an application in her lifetime. The right of action which at common law would have died with the person is continued by 3 & 4 Wm. IV. c. 42, s. 2, against the executor, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor shall have taken upon himself the administration of the estate and effects of such person." The wrong of not repairing was a continuing wrong, giving a cause of action *de die in diem* up to the day of the death of the tenant for life, and the action was brought within six months after the death. The plaintiff, therefore, is entitled to recover by virtue of this statute."

Le in re Williams 4 C.P.D. 24.

Committing an act of Waste then was formerly punishable by forfeiture of the estate itself, or the interest of the tenant under it; which could be enforced under a process called a 'writ of waste'—an action brought by the reversioner against the tenant. Remedy.

(*d*) 2 Inst. 145.

(*dd*) *Post*, p. 52.

(*e*) *Bacon* v. *Smith*, 1 Q. B. 345.

(*ee*) See notes to *Green* v. *Cole*, 2 Wms. Saund. 251.

Chap. I.

A statute, however, of the late reign (*f*), in abolishing a variety of old writs, includes the 'writ of waste' under the series; and the remedy of the reversioner or remainderman is now, either compensatory by action for damages for wrong done or preventative by injunction to stop it.

c. Equitable waste. Without impeachment of waste.

Were the tenant for life made, as he sometimes is, dispunishable for Waste, or, as it is termed, his estate is 'without impeachment of Waste,' this would give him a legal right (*g*) to cut down timber and open mines, provided only that he do this in the ordinary course of management, or, as regards timber, as it is usually termed of 'good husbandry.' But a Court of Equity, on the ground that it would not permit an unconscientious use to be made of a legal power, would restrain him from pulling down or defacing the family mansion, cutting down timber planted or left standing for ornament or shelter (*h*), or doing other acts of spoliation; which were therefore called Equitable Waste. Now it is provided by the Judicature Act, 1873 (*i*):—

> S. 25, § 3. "An estate for life without impeachment of Waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit Waste of the description known as Equitable Waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

The question recently arose, where a tenant for life unimpeachable for Waste properly cut ornamental timber, whether he was entitled to the proceeds, and it was decided in the affirmative; the whole doctrine of Equitable Waste was considered by Jessel, M.R. (*k*), in the following judgment:—

"An equitable tenant for life unimpeachable for Waste cut ornamental timber, and he alleged that he cut it, not only properly, but beneficially for the ornamental timber which remained; and accordingly an inquiry was directed in this form—(His Lordship read it, and continued):—I need not trouble myself about the last part of the inquiry, because the first part of it has been answered in favour of the tenant for life; that is, in effect, that the trees which he did cut injured or impeded the growth of other trees which were of essential importance for ornament or shelter; in other words, he did that which the Court directed to be done in the cases of *Lushington* v. *Boldero* (*l*), and *Ford* v. *Tynte* (*m*). It seems

(*f*) 3 & 4 Wm. IV. c. 27 (Limitation of Actions), s. 36. See *supra*, p. 51.

(*g*) See *Downshire* v. *Sandys*, 6 Ves. 107; and *ib.* 110*c*, note, *Wombwell* v. *Belasyse*.

(*h*) *Ib.* 110*a*.

(*i*) 36 & 37 Vict. c. 66, s. 25, § 3; see also § 11.

(*k*) *Baker* v. *Sebright*, L. R. 13 Ch. D. 183.

(*l*) 6 Madd. 149.

(*m*) 2 D. J. & S. 127, 129.

that the trees cut were of considerable value, and of a value very much in excess of the cost of cutting; that is admitted; and, consequently, there was a considerable sum arising from the proceeds of the sale of the timber cut which went into the pocket of the tenant for life.

"The question I have now to decide on further consideration is, whether the equitable tenant for life unimpeachable for Waste is entitled to retain the proceeds of the timber so cut for his own use. If he is not, a second question arises which otherwise it is not necessary to discuss.

"The point, as I said before, does not appear to have been directly decided; but, from the cases I am about to refer to, it seems to have been indirectly decided or assumed in favor of the tenant for life; and in deciding it, apparently for the first time, I have no hesitation in saying that, looking at the principles which have been laid down by the Court of Chancery as, so to say, the ground of its interference with the tenant for life in respect of what is commonly called 'ornamental timber,' that is, timber planted for ornament or shelter, it is impossible to hold that this tenant for life ought to be interfered with at all; that is to say, his rights, such as they would have been had the timber not been ornamental, remain unaffected by what has occurred.

"The way to look at the matter is this: Courts of Equity restrained a legal tenant for life unimpeachable for Waste from committing some kinds of Waste which are called Equitable Waste. Why? Because it was considered that, though he had legal powers, he was not using them fairly—he was abusing them so as to destroy the subject of the settlement. That was the only ground, as it was said. Sometimes he was making an unconscientious use of his powers; and in fact the first case on the subject, the case of Lord Barnard (*n*), who, to spite the remainderman, took off the roof of Raby Castle, was a very striking case of the unconscientious use of those powers.

"It does appear to me that the ground stated for the Court's interference quite represents the true view of the matter. The Court of Equity did interfere by injunction to restrain the act of the tenant for life, because it was an unconscientious use of his powers; and, therefore, unless the Court of Equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful. The legal result of his act would follow in the same way as if no such doctrine as Equitable Waste were known: in other words, in the case put, he rightfully cuts the timber; and really it comes to that point. Now, if he rightfully cuts the timber, it must be plain that that cannot be called an unconscientious use of his powers, because he is doing that which not only the Court itself would allow, but by established rule will now direct to be done: and it seems to me impossible to say, when he has done that which was necessary, so to speak, in order to preserve the remaining timber for the purpose for which it was planted, that what he has done was improperly done. That does not necessarily refer to decaying timber that may be ornamental, and which the Court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for waste, in the ordinary course of management, and then the proceeds are invested for the benefit of the estate. It may be prudent to cut timber

(*n*) 2 Vern. 738.

Chap. I.

which is decaying, when to do so is beneficial for all parties, and when the Court has them all before it, although there is no absolute right to cut it, because it is ornamental timber. As we all know, there are oaks and other trees which will decay for centuries and still be ornamental. Therefore what I am saying does not necessarily apply to decaying timber, but it does apply to a case where the timber cut is impeding the growth of what I will call more ornamental timber; there cutting is the right thing to do.

* * * * * * * *

"If the tenant for life has only cut such of the ornamental trees as impeded the growth of the others, and such as were, as between the trees cut and those left standing, the most proper to be cut, how can I say he has acted unconscientiously or improperly? It seems to me I could not have granted an injunction against his doing this if he had shown that what he intended to do was exactly what he has done; and that being so he is entitled to the proceeds."

Leases and Sales of Settled Estates Acts.

The Leases and Sales of Settled Estates Act, 1856 (*o*) empowered tenants for life, unless expressly forbidden by the settlements under which they hold (*p*), if the settlement was made after 1st November, 1856 (the date of coming into operation of the Act (*q*)), to grant leases for twenty-one years, except of the principal mansion house, and demesnes thereof, and other lands usually occupied therewith. This was re-enacted in the Settled Estates Act, 1877 (*r*), by which also larger powers of leasing were given to the Chancery Division of the High Court (*s*), whatever the date of the settlement, than had been given under the previous Acts to the Court of Chancery (*t*). Under the term 'settlement' is here included any instrument by which any hereditaments, or any estates or interests therein, stand limited to or in trust for any persons by way of succession (*u*). Further, by the Act of 1856 (*x*), power was given to the Court of Chancery even to authorise a sale of the whole or part of any settled estates, and this was re-enacted by the Settled Estates Act, 1877 (*y*). But the Court is not to exercise any of these powers if an express declaration that they shall not be exercised is contained in the settlement (*z*); there must be an express declaration to negative the power of the Court, otherwise, though the settlement contain powers, the Court may proceed under the Act (*a*).

(*o*) 19 & 20 Vict. c. 120.
(*p*) S. 32.
(*q*) Ss. 44, 46.
(*r*) 40 & 41 Vict. c. 18, ss. 46, 57.
(*s*) S. 3.
(*t*) S. 4.
(*u*) S. 2.
(*x*) 19 & 20 Vict. c. 120, s. 11.
(*y*) 40 & 41 Vict. c. 18, s. 16.
(*z*) S. 38.
(*a*) The Act 19 & 20 Vict. c. 120, was amended by 21 & 22 Vict. c 77, 27 & 28

Improvements.

Other Acts of Parliament have also been passed in the present reign, enabling tenants for life to improve the inheritance—*e.g.*, by draining. The statute 8 & 9 Vict. c. 56, enables them to defray the expenses by way of mortgage; 9 & 10 Vict. c. 101 (*b*) by an advance of public money. To enable them to make improvements, not only by draining, but also by irrigation, embanking, inclosing, reclaiming, making permanent roads, railways or canals, clearing, erecting buildings, planting for shelter, &c., the Improvement of Land Act, 1864 (*d*), was passed. And to the list of improvements in that Act specified was added by the Limited Owners Residences Act (1870) Amendment Act, 1871 (*e*), the erection, completion, improvement of and addition to a mansion house, suitable to the estate as a residence for the owner.

Mr. Dart (*f*) points out the prudence of now searching for drainage and improvement loans on purchases of large estates, or even of agricultural land of moderate acreage. He says:—

> "These incumbrances, where they exist, take priority of all other charges; and, in more than one instance in the author's own experience, an omission to make the search would have involved serious consequences. The expediency of making it is not, however, as generally known in the profession as it ought to be."

Settled Land Act, 1882.

In Wills or Settlements of real estate, it has been usual to give power to the tenant for life, and then to the trustees during the minority of any to take subsequently, to lease (*g*); also to the trustees to sell or exchange with the consent of the tenant for life (*h*). Where power of sale or exchange was given, the provisions for working out the same contained in the Trustees', &c., Powers Act, 1860 (*i*), might be relied on, unless expressly negatived, or, so far as they were not varied by the deed, will, or other instrument of settlement (*k*). But the above enactment has been repealed as from after 31st December, 1882, by the

---

Vict. c. 45, 37 & 38 Vict. c. 33, 39 & 40 Vict. c. 30; all were repealed by the Amending and Consolidating Act (40 & 41 Vict. c. 18), s. 58.

(*b*) With the amending Acts, 10 & 11 Vict. c. 11, 11 & 12 Vict. c. 119, 13 & 14 Vict. c. 31, and 19 & 20 Vict. c. 9.

(*d*) 27 & 28 Vict. c. 114, extended by Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30.

(*e*) 34 & 35 Vict. c. 84.

(*f*) V. & P. 455.

(*g*) See forms 1 Da. 384, and Da. C. P. (11th ed.) 402, and 411.

(*h*) See forms in Da. C. P. 403, 412; and as to covenants to be implied in a conveyance under such power, see Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1), (2), and (7); and Wolstenholme & Turner's Form, p. 156, and note to s. 7 (8).

(*i*) 23 & 24 Vict. c. 145, pts. i. & iv.

(*k*) S. 32.

Chap. I.

Settled Land Act, 1882 (*l*). In future, all provisions in respect of leasing, sale, or exchange, may in general be omitted (*m*). For the Settled Land Act, 1882, which takes effect from and after 31st December, 1882, but is not confined in its operation to future settlements, enables a tenant for life to dispose by sale, lease, or exchange of any part of the settled land, or even of the whole of it; provision being made for securing the purchase-money on a sale, or property taken in exchange, and otherwise for protecting the interests of the remainderman, and of others entitled to come in under the settlement.

A tenant for life within the meaning of the Act is generally any limited owner, and is the person for the time being under the settlement beneficially entitled to possession for life; if two or more persons are so entitled, they together constitute the tenant for life: such person or persons is or are tenant for life within the meaning of the Act, notwithstanding the land or such estate or interest in it is incumbered or charged (*n*).

Sales and exchange.

The tenant for life is empowered to sell or exchange (*o*) from time to time (*p*), and therefore also to contract to sell or exchange (*q*), according to his own judgment and discretion, without the necessity for the trustees of the settlement taking any steps to initiate and carry through the sale or exchange, or for the estate being put to the expense and delay of proceedings by a petition (*qq*) in Chancery under the Settled Estates Act, 1877; a power of sale and of exchange is thus made incident to the estate of the tenant for life. But to prevent abuse of such power, it is provided that the sale or exchange must be at the best price or for the best consideration reasonably obtainable (*r*); that the tenant for life must have regard to the interests of all parties entitled under the settlement for whom he is to be a trustee (*s*); that he shall give notice, as prescribed, of his intention to sell or exchange to the trustees and separately to their solicitor, if known, and at the date of notice there must not be less than two trustees unless the contrary has been expressed in the settlement (*t*); that if a difference arises between the tenant for life

---

(*l*) 45 & 46 Vict. c. 38, ss. 64 and 1.
(*m*) Ss. 56, 57 (*post*, p. 59.
(*n*) Ss. 58—62, and s. 2 (5), (i), and (7); also see ss. 5 and 19, & 21 (h).
(*o*) Ss. 3 and 20.
(*p*) S. 55.
(*q*) S. 31.
(*qq*) See *ante*, p. 49, note (*u*).
(*r*) S. 4 (1).
(*s*) S. 53.
(*t*) S. 45.

and the trustees, either party may apply to the Court, that is, the Chancery Division of the High Court, the Court of Chancery of the County Palatine, or the County Court, as the case may be (*u*); that the principal mansion house and the demesnes and other lands usually occupied therewith are not to be sold without the consent of the trustees or an order of the Court (*x*); that the purchase-money in case of sale must be paid to the trustees or into Court for investment or application; the option, however, which shall be done is with the tenant (*y*). On the other hand, the purchaser dealing in good faith with the tenant for life, is to be conclusively taken to have given the best price reasonably obtainable, and to have complied with all the requisitions of the Act (*a*).

If the purchase-money is paid to the trustees, the tenant for life may direct the investment or application, and if he do not, it is in the discretion of the trustees, subject to any consent required or direction given by the settlement; and the investment must be in the names or under the control of the trustees (*b*); if the money is paid into Court, the investment or other application is to be made by the Court on the application of the tenant for life or of the trustees (*c*); an investment or other application once made, it cannot be altered during the life of the tenant for life without his consent (*d*). The money may be invested on any securities on which the trustees are authorised by the settlement or by law to invest, and a wider scope of investment is made lawful than has hitherto been allowed by law to trustees (*e*). The income of the securities is to be applied as the income of the land would have been if not sold (*f*); and the capital is, for the purposes of disposition, transmission and devolution, to be considered as the settled land which has been sold (*g*). Purchase-money not invested on securities may be applied in discharge of incumbrances and charges on the land not sold, and in other various modes specified (*h*), including purchase of other land, and improvements authorised by the Act for the benefit of the unsold land (*k*);

Improvements.

(*u*) S. 44, and ss. 46, 47.
(*x*) S. 15.
(*y*) S. 22.
(*a*) S. 54. And see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.
(*b*) S. 22 (2).
(*c*) S. 22 (3).
(*d*) S. 22 (4).
(*e*) S. 21 (1).
(*f*) S. 22 (6).
(*g*) S. 22 (5).
(*h*) S. 21 (ii.)—(xi.).
(*k*) S. 25.

Chap. I.

and provision is made for securing the due execution and maintenance of such improvements under the control and supervision of the Land Commissioners (*l*). Occasion is taken to extend the enumeration of improvements in the Improvement of Land Act, 1864 (*m*); and to consolidate into one body under the style of the Land Commissioners for England, the Commissioners hitherto bearing the three several styles of the Inclosure Commissioners for England and Wales, the Copyhold Commissioners, and the Tithe Commissioners for England and Wales (*n*).

Land in exchange.

If land is taken in exchange, it is to be made subject to the settlement in manner prescribed (*o*).

Leases.

The tenant for life is similarly empowered to grant leases (*p*), and therefore also to contract to lease (*q*), but subject to the same checks against the abuse of such power as in the case of sale (*r*). He may lease the settled land or any part of it, or any easement, right, &c., for ninety-nine years, in case of building, sixty years in case of mining, and twenty-one years in any other case (*s*). The best rent reasonably obtainable is to be reserved, regard being had to any fine taken, to money laid out for the benefit of the land, and generally to the circumstances of the case (*t*). If a fine is taken, it is to be treated as capital like purchase-money on a sale, but the laying out or investment of it is to be by the trustees or the Court, in such manner as to give to the parties interested in the money the like benefit as they might lawfully have had from the lease; and any party interested in the money may apply to the Court (*u*).

In the case of a mining lease, unless a contrary intention is expressed in the settlement, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, otherwise one-fourth part, must be treated as capital, and set aside (*x*). Full powers are given to the tenant for life for developing the settled land for building (*y*), or mining (*z*). The

(*l*) Ss. 26—30, and 49.
(*m*) S. 30, 27 & 28 Vict. c. 114, s. 9, *ante*, p. 54.
(*n*) 45 & 46 Vict. c. 38, s. 48.
(*o*) S. 24 and s. 20.
(*p*) S. 6.
(*q*) S. 31.
(*r*) See ss. 15, 44, 45, 53, 54.
(*s*) S. 6; and see ss. 12, 20 and 55.
(*t*) S. 7 (2).
(*u*) S. 34. This corresponds with the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 74; and the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 37. See *In re Wilkes' Estate*, L. R. 16 Ch. D. 597.
(*x*) S. 11.
(*y*) Ss. 8, 10, 13 and 16.
(*z*) Ss. 9, 10, 13, 17.

power to grant a lease for building includes the power to grant the land in perpetuity at fee-farm rent (*a*) with the consent of the Court (*b*).

Protection of settled property.

The Act further provides that the Court may sanction any proceeding for the protection of settled land, or for recovery of land alleged to be subject to a settlement, and to direct payment of costs out of property subject to the settlement (*c*).

Powers under Act cumulative; cannot be abrogated.

The powers of a tenant for life under the Act cannot be assigned or released, voluntarily or involuntarily; and a contract by a tenant for life not to exercise any of his powers under the Act is void (*d*), and any prohibition of the exercise of his powers is void (*e*); and notwithstanding anything in the settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture (*f*). The powers given by the settlement are not taken away or abridged by the Act, and the powers given by the Act are cumulative; but in case of conflict between the provisions of a settlement and those of the Act, the latter are to prevail, any question being subject to determination by the Court (*g*); and there is nothing in the Act to prevent additional or larger powers being conferred by the settlement (*h*).

Heirlooms.

Under the Settled Estates Acts, no power was given for the sale of chattels, as pictures, tapestries, plate, &c., strictly settled as heirlooms to go along with the estate. The Court could only, unless, where the settlement was by will, debts of the testator remained unpaid, authorise application to Parliament for an Act, however beneficial a sale might be for all parties interested (*i*). Now, however, by the Settled Land Act, 1882 (*k*), power to sell such chattels is given to the tenant for life, but not without the order of the Court.

Infants. Married women. Lunatics.

Special provision is made by the Settled Land Act, 1882 (*l*), to meet the cases of the tenant for life being one of the classes of persons said to be under disability—that is to say, Infants, Married Women, and Lunatics. If an Infant be tenant for life, his powers are to be exercised by the trustees of the settlement, or, if there

(*a*) See *post*, p. 360.
(*b*) S. 10.
(*c*) S. 36. In substitution for s. 17 of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18).
(*d*) S. 50.
(*e*) S. 51.
(*f*) S. 52.
(*g*) S. 56. Ld. '74, s. 6(2)
(*h*) S. 57.
(*i*) *D'Eyncourt* v. *Gregory*, L. R. 3 Ch. D. 635, and see *Fane* v. *Fane*, L. R. 2 Ch. D. 711.
(*k*) 45 & 46 Vict. c. 38, s. 37.
(*l*) 45 & 46 Vict. c. 38, ss. 60—62.

Chap. I.

are none, under the direction of the Court (m); if a Married Woman be tenant for life, the powers may be exercised by her alone, or by herself and her husband together, according to specified circumstances (n); and if a Lunatic be tenant for life, the powers may be exercised by the committee of his estate under order of the Lord Chancellor or other person entrusted with the care of lunatics (o).

Conveyance by tenant for life to give title (for benefit of creditors).

There remains to be noticed an Act passed for the benefit of creditors, where a sale or mortgage of the lands of a testator is requisite for payment of his debts, and he has left them in settlement. The statute 11 Geo. IV. & 1 Will. IV., c. 47 (p), enabled the tenant for life under the direction of the Court of Chancery to convey to the purchaser or mortgagee.

Curtesy.
Dower.
Tenant in tail after possibility of issue extinct.

We have described the class of estates more generally known under the expression of estates for life, and its leading incidents. As glanced at, however, in the definition above given of such an estate, there are interests which in law are treated as falling under the description of an estate for life, because they are, or are capable of being, held for the life of the tenant. Such, for example, are the interests of a husband in the estate of his wife, called 'an estate by the curtesy of England,' of a wife in the property of her husband, which may, according to its peculiarity, be either dower or jointure, and of a tenant in tail after possibility of issue extinct (q). These, however, though literally falling within the definition of an estate for life, are severally of a distinct and peculiar nature, and will be best treated of under their own separate heads; therefore, the consideration of them shall be deferred to future chapters.

(m) S. 60.
(n) S. 61. See *post*, p. 119.
(o) S. 62.
(p) Explained and extended by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87.
(q) See Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2; and Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (vii.) and (viii.). See *post*, p. 63; and chap. iv.

CHAPTER II.

ESTATES TAIL.

I. Estates tail —what.

An Estate Tail, or, as it is otherwise called, an 'entail,' derives its title from the French word *tailler* (to cut or abridge), from the restricted character which, under the Statute *De Donis* (as will presently appear), estates of inheritance granted to a man and particular heirs, as the heirs of his body, obtained.

While an estate for life is limited in its duration to the original donee himself—*i.e.*, the person to whom the estate has been given or granted, as opposed to the donor who gave or granted it—or at least to the life or lives for which it is holden, an Estate Tail involves a succession in a course of descent; but the descent must be from the original donee (or person to whom the first estate was given or granted) downwards in a direct course. The estate cannot go, as will be seen, in the case of fee simple estates, to his general or collateral heirs. 'General heirs' may be in either the ascending or descending line; for example, a father or grandfather might be a general heir to the last owner, as well as a son or a grandson. 'Collateral heirs' are those deriving their descent through some stock in the ascending line: for instance, a brother as a son of the common father, or an uncle as a son of the common grandfather, or a sister, or an aunt, or a cousin. 'Heirs in tail' can only be in the descending line.

General: qualified.

The gift or grant may be a 'general' one to A. and the heirs of his body, or it may be 'qualified.' A gift to A. and the heirs of his body, only restricts the descent to heirs issuing from himself as the parent stock of the inheritance and no farther. But the restriction may be not only to heirs sprung from himself, but to heirs of one sex, as either male heirs or female ones; or it may be, not to heirs of either class generally, but to those begotten from a particular woman, or by a particular man.

In each instance, however, (only within the class prescribed by the grant) the course of devolution is consistent with the ordinary descent prevailing in the kingdom, as regulated by common law or by local custom, except so far as such law or custom is affected

Chap. II.

by the Act for the amendment of the Law of Inheritance (*a*) in respect to persons deceased on or after 1st January, 1834. This course of descent is the subject of a later chapter. Thus, wherever neither the peculiar customs of Gavelkind nor of Borough-English prevailed, in the case of a gift to A. and the heirs of his body, the descent would fall on the eldest son, to the exclusion of all others; while in a Gavelkind locality the estate would go among all, and in a Borough-English one to the youngest. The same result would ensue in the instance of the grant being restricted to heirs either male or female. Whoever would have been the heir of that particular designation, and traced through that particular channel of succession, would be the person on whom the inheritance would devolve; and this would of course equally apply where the original procreation was limited to a particular parent, as in the case of the gift to heirs begotten of a particular woman, or by a particular man.

Qualified: male, female—special.

When restricted to the heirs of one sex only, it is 'tail male' or 'tail female,' according to the sex—as, an estate to A. and the heirs male of his body, or one to B. and the heirs female of his.

Were the gift to the issue of some specified parental stock—as to A. and B., husband and wife, and the heirs of their two bodies, or to the heirs of the body of A. begotten of B., it would be an entail 'special.' Of course, this too might have the additional restriction of either a male or female line of descent.

The form, then, of the restriction or limitation prescribes the course of devolution. It should be added that, in the instance of an estate in tail male, females cannot inherit; nor, in that of one in tail female, can males. Special estates tail and estates in tail female rarely occur.

Duration.

Whatever the classification under which the entail may fall, the estate will of itself last so long as there exists issue of the prescribed character; so long as there is, as it were, a stream flowing from the fountain, and, on this failing, the estate 'reverts' to the original grantor or 'goes over' in the first instance to the next prescribed line of succession. But this estate in its existing form may be destroyed and become expanded into a larger ownership, so as both to get rid of the restrictive character of the course of descent, and to extinguish the going over to the next line and the reverter to the donor. Now, under the Fines and

(*a*) 3 & 4 Wm. IV. c. 106, amended by 22 & 23 Vict. c. 35, ss. 19, 20.

Recoveries Act (*b*), generally every tenant in tail can, by deed duly enrolled, convert his estate into an absolute estate in fee simple; but, so long as the original estate remains, it subsists under the above condition.

Tenant in tail after possibility of issue extinct.

In the instance of a gift in tail special, as to heirs begotten of a particular wife, should the wife die no issue ~~having been begotten of her~~, the owner of the estate would be termed a 'tenant in tail after possibility of issue extinct,' which is treated under the Settled Estates Act, 1877, and the Settled Land Act, 1882 (*bb*), as a life interest. In all other cases, notwithstanding the natural improbability arising from old age, the law (*c*) considers the possibility of issue to exist, and the tenancy remains of its original character. This point, however, is practically material only in reference to the power of expansion of the ownership just above adverted to (*cc*).

Freehold.

The lower interest in an estate for life amounting to a freehold, the higher one in an entail falls of course within the same range; all estates tail are estates of freehold, and are called in full 'estates in fee tail,' and the owner is called the 'tenant in tail.'

Words of inheritance and procreation.

Except in the instance of a will, where greater latitude of construction is allowed, words indicative both of inheritance and procreation, have until recently been necessary to create an entail. Thus, in a deed an entail, or any greater estate than one for life, would not be created under such words as 'to A. and his issue,' or 'to A. and his offspring or children.' To create an estate in fee tail by deed, there must have been a marking out or 'limitation' of the estate, not only (as in the creation of an estate in fee simple) to the heirs, but also to the particular heirs, as to A. and

---

(*b*) 3 & 4 Wm. IV. c. 74, ss. 15, 41.

(*bb*) 40 & 41 Vict. c. 18, s. 2, and 45 & 46 Vict. c. 38, s. 58 (vii.), *ante*, p. 60.

(*c*) In the *Banbury Peerage Case* several instances were cited of men above eighty being known to have had children. The same presumption is not always in equity held to arise in regard to women. For instance where a woman was entitled under her father's will to a share in his residuary estate absolutely if she had no children; but, in case of having a child or children, only for her life with a power of appointment among them; being a spinster, of the age of 54 nearly, her share was ordered to be paid to her (*In re Widdow's Trusts*, L. R. 11 Eq. 408); and see *In re Millner's Estate*, L. R. 14 Eq. 245, where the woman was forty-nine years and nine months old, and she had been married twenty-six years to her husband, and was without children. On the other hand the Court refused to treat as past child-bearing a woman aged fifty-four years and six months, and who had never had any children but had only been married three years. (*Croxton* v. *May*, L. R. 9 Ch. D. 388.)

(*cc*) And see *post*, p. 72.

Chap. II.

the heirs of his body; that is, there must have been words of inheritance and of procreation. In a will a devise to a person and his seed, or to him and his issue, or to him and his heirs male, has been held to create an estate tail.

Now, by the Conveyancing and Law of Property Act, 1881, in the case of deeds executed after the 31st December, 1881, it will be sufficient in the limitation of an estate in tail to use the words 'in tail' without the words 'heirs of the body,' and in the limitation of an estate in tail male, or in tail female to use the words 'in tail male' or 'in tail female,' as the case requires, without the words 'heirs male of the body,' or 'heirs female of the body' (*d*).

II. Historical development.

Such is the general character of an estate tail as recognised by English law at the present day; but no less from its historical interest than for the better comprehension of the incidents attached to it, particularly that of its being convertible into an estate in fee simple, it will be fitting to go back to an earlier period of the law, and to trace out the transitions by which this species of estate has reached its present development.

Conditional fee.

When feuds first became descendible by the extension in the grant to heirs, the restriction to those of the body of the grantee—those sprung from his very loins—was no doubt originally designed to confine the succession to that particular class, leaving the donor to resume the possession on its failure. By a somewhat singular and strained construction, however, put in early times by the judges upon grants of this description, in favour of commerce and the making provision for younger branches of the family (*e*), a gift to a man and the heirs of his body was held to be in the nature of a gift absolute to himself, conditional only on his having issue, and the reverter to the donor was held as conditional only on the donee's having none. Thus, the birth of issue converted the conditional estate into an absolute ownership; the condition was said to be performed, and the estate accordingly to have become absolute, but only to the extent of conferring a general power of alienation, subjecting the land to forfeiture for the treason of the donee, and, in the absence of a more unqualified alienation, empowering the donee to make certain charges binding against his issue. Neither alienation,

(*d*) 44 & 45 Vict. c. 41, ss. 51 and 1, and 4th Sched. IV.

(*e*) Co. Litt., ed. by Thomas, vol. i 508 (n.).

forfeiture, nor charge, however, intervening, the original course of descent prevailed, and the land devolved on the issue; or, on their failure, it reverted to the donor (*f*).

The construction put upon these grants, though very fortunate for the donee in awarding to him a power of alienation, was extremely distasteful to the class most affected by it, namely, the great landholders, *i.e.*, the grantors of the feuds under which the lands were holden. The creation of a power of alienation on the mere birth of an expectant heir diminished the chance of the reverter of the estate to the lord; while, with every alienation, and particularly if in the nature of a subinfeudation, the rents and services attached to the original grant became practically matters of more difficult recovery and enforcement by reason of the change, and possibly often the multiplication, of the ownership. The latter grievance had indeed been partially provided against by the statute of Magna Charta, which enacted that no freeman should give or sell any more of his land than so as that what remained might be sufficient to answer the services he owed to his lord. But, practically, the enforcement of the services became more difficult by the division of the lands to a varied and sometimes complicated ownership; and this remedy in no way affected the diminished chance of resuming possession of the whole of the land on the failure of the issue.

Magna Charta.

By the reign of Edward I. (*g*), this diminished possibility of estates reverting to them had become so strongly felt by the great feudal barons, that their influence produced as a remedy the statute, which is a very celebrated one in the history of English law, known as the Statute of Westminster the Second, or more commonly, that De Donis Conditionalibus. Lord Coke says:—

Statute *De Donis.*

"It is called Westminster the Second because the parliament was holden at Westminster, and hath the name of the Second, because another parliament was formerly holden at Westminster in the third year of the same king's reign, which was called Westminster the First. And albeit many parliaments were afterwards holden at Westminster besides these, yet were they two only, *propter excellentiam*, called the Statutes of Westminster" (*h*).

This statute enacted that from henceforth the will of the donor be observed *secundum formam in cartâ doni expressam*, and that

(*f*) Co. Litt. 19*a*, ed. by Thomas, vol. i. p. 508.

(*g*) A.D. 1285: 13 Edw. I. c. i.

(*h*) Coke Litt. 19*a*, ed. by Thomas, vol. i. p. 512.

Chap. II.

the tenements so given (to a man and the heirs of his body, or the heirs male of his body or the like) should, notwithstanding any alienation by the donee, go to his issue if there were any, or, if issue failed, should revert to the donor or his heirs. This abridgment of the power of alienation—the restriction to descent to the issue, and the reverter to the lord on their failure—was the cutting down adverted to at the opening of the chapter, and which gave to this estate the name of *feodum talliatum* or 'fee tail.'

"Upon the construction of this Act of Parliament," says Blackstone (*i*), "the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee tail, and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us, that tenant in fee tail is by virtue of the Statute of Westminster the Second."

The Statute was, at the time of its enactment, supposed to be a final accomplishment of its object. The result, however, showed that the remedy of one class of grievances only called into existence, and in an opposite direction, another still greater. Blackstone (*k*) says:—

"The establishment of this family law occasioned infinite difficulties and disputes. Children grew disobedient, when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: and treasons were encouraged; as estates tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new conventions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm."

Still such was the power of the nobility, that for a period of about 200 years the statute was triumphant, and the evils thus pointed out had to be endured in passive submission.

At length, however, ecclesiastical subtlety and a decision of a

(*i*) Vol. ii. 112.

(*k*) Vol. ii. 116.

court of law (pronounced in the reign of Edward IV.), operating on an ecclesiastical invention, provided a remedy (*l*), and not only restored the power of alienation to the extent to which it had prevailed previously to the Statute De Donis, but gave it a much more extended character. In fact, it enabled any tenant in tail, of what description soever (save only the one after possibility of issue extinct, and some others of now obsolete character), such tenant in tail having an estate in possession in the lands, not only to destroy the entail, that is, the descent on the issue, but the reverter to the lord, in other words, both the entail itself and all estates taking effect on its extinction; in short, to convert the estate tail into one in fee simple.

Mortmain.

For some time previously to this, alienation 'in mortmain,' as it was called, that is a gift in perpetuity, generally to religious houses, had been prohibited by statute. Alienation in mortmain (*in mortuâ manu*) was an alienation of lands or tenements to any corporation.

"But," says Blackstone, "these purchases have been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand; this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the Statutes of Mortmain" (*m*).

For some time the ingenuity of the monks had contrived to defeat the statutes by the invention of a process in the courts of law called a 'recovery' (*n*). This was a fictitious action brought by the religious house against the tenant in possession, for the recovery of the lands granted in mortmain, under which the right was surreptitiously awarded to the house in the teeth of the statutes. The monks set up a fictitious title to the land; the tenant, acting in collusion with the monastery, made no defence to the action. Judgment was therefore given to the religious house, which then recovered the land by a sentence of law upon a supposed prior title, and hence the name of a 'recovery' given to the action. The original Statutes of Mortmain were addressed in terms only to gifts and conveyances between the parties, and did not apply to actions. Later statutes, particularly that of Westminster the Second (*o*), had restrained the use of the device in reference to lands in mortmain, but the device itself had not

(*l*) 2 Bl. 117, 271.
(*m*) 2 Bl. 268.
(*n*) 2 Bl. 271.
(*o*) 13 Ed. I. c. 32.

Chap. II.

Taltarum's Case.

been forgotten. In the reign of Edward IV. (*p*) it was again revived, and its application to entails was brought before the Courts in a case which, from the name of the original actors in the scene, has been handed down to posterity under the name of *Taltarum's Case* (*q*). The case is said to have been brought into court under the direct encouragement of the King; who, in the disputes between the Houses of York and Lancaster, observing how little effect attainders for treason had on families whose estates were protected by entails (*r*), desired to introduce, through the instrumentality of the courts of law, a means of destroying them.

Recovery.

The 'recovery' operated not only on the entail, but on all that was expectant on its extinction, and converted the estate into an absolute one in fee simple, discharged alike of the entail itself and of all remainders and of the reversion expectant upon it—*i.e.*, not only were the issue and the donor barred of their rights, but also all other persons to whom estates had been given expectant on the death of the tenant in tail without issue inheritable: for instance, if lands had been given by A. to B. and the heirs of his body, and in default of such issue to C. and the heirs of his body, the issue of B. would be barred, the estate 'in remainder,' as it was called, to C. would be barred, and the reversion of A. and his heirs would be barred.

The principle on which this was founded was as follows: in the writ (called a '*præcipe quod reddat*,' from its initial or more operative words) it was alleged that the defendant had no legal title to the land, but that the demandant, having originally had the possession, had been wrongfully turned out of it by the party through whom the tenant or defendant claimed (*s*). The answer of the defendant was, that the party from whom he derived his title had on the occasion of the original grant warranted the possession to him, and therefore he urged that he should be called upon to defend it. The party thus called upon, termed the 'vouchee' (from *vocatio*, 'calling'), practically admitted the warranty by suffering judgment to go against him by default. The ultimate judgment of the Court therefore was, that the demandant, then called the 'recoveror,' should recover the lands against the tenant, then called the 'recoveree,' and he in turn was to

(*p*) A.D. 1473.

(*q*) 2 Bl. 117.

(*r*) Estates tail were not liable to forfeiture longer than for the tenant's life. (2 Bl. 116.) *Ante*, p. 66.

(*s*) 2 Bl. 358.

recover lands of equal value as a recompense against the supposed warrantor, which recompense, if given, would have gone in substitution of the lands recovered, and been subject accordingly both to entail and to all in the way of remainder or reversion expectant upon its termination. It is true the recompense which was the supposed support of the judgment failed, but there was a possibility in the contemplation of law of its being made, and there was a judgment of the Court for the recovery; in other words, a judgment awarded the restitution of the lands to the demandant, and this upon the theory of an absolute right in the demandant. The result was that the old estate became extinguished, and a new one was acquired by the judgment, just as if a new grant had been made; and where the recoveror (demandant in the action) was the purchaser of the lands from the tenant, the recovery operated merely in the nature of a conveyance to him of the fee simple (*t*).

"These recoveries," says Blackstone in 1765 (*u*), "however clandestinely begun, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no Court will suffer them to be shaken or reflected on, and even Acts of Parliament have by a side-wind countenanced and established them."

Fine.

The destruction of the entail, and the acquisition thereby of power of alienation by the tenant, for such period as there should remain issue inheritable, might also have been effected by another fictitious process called a 'fine,' which was inoperative, however, on the remainders (if any) and the reversion.

A 'fine,' like a recovery, was an action brought in the name of another, and a friendly party to whom the land was to be conveyed or assured, against the intended vendor; in fact, for recovery of possession of the land, but, in form, in the nature of an action on covenant. It was called a Fine from the Latin word 'finis,' or end; because, it was said, it put an end, not only to the suit then commenced, but to all other controversies concerning the same matter. It was in itself, as a process, known to the law more anciently than a recovery, and, indeed, as Blackstone (*x*) tells us, was of equal antiquity with the first rudiments of the law, though its application

(*t*) For full account, see 2 Bl. 357.
(*u*) Vol. ii. 117.
(*x*) 2 Bl. 349.

Chap. II.

to the destroying an entail was somewhat later than that of the recovery. The recovery proceeded on the principle of carrying the action through all its stages to a final judgment. The principle of the fine was compromise, or acknowledgment of the right claimed, under a sanction given to it by the Court. The whole basis of the proceeding was, that the party against whom the action was brought had covenanted with the plaintiff in it to convey to him the lands in question, and the purpose of the action was to obtain the land or recompense for the breach of the covenant. The compromise acknowledged the right of the plaintiff, but, the plaintiff having on bringing his action given pledges to the Court to prosecute the same, it was necessary to obtain the sanction of the Court for the settlement of the action. The leave of the Court to make the matter up converted the arrangement into a judicial one, and this was called the Concord, and was the substantive and effective part of the fine. The Concord was followed by enrolment of the whole proceedings and the making them up into a record; and latterly, the process was completed by proclamations had in open court, that is, a public announcement of the transaction in open court. The Court was accustomed to hold four sittings in each year, called terms, and the fine was to be proclaimed four times in the term in which it was levied, and four times in each of the three succeeding terms (*y*).

Originally the whole proceedings of a fine were in the nature only of private ones between the parties, and it was not until the mischief arising out of this secret course of proceeding began to develop itself, that the necessity of proclaiming the fine in open court, called 'levying it with proclamations,' was enjoined. In its inception and before proclamations were required, the fine only bound either parties to it, or those in privity with them, called 'privies'—that is, persons claiming through the parties. When proclamations, however, were introduced, the fine became operative on strangers, and bound them, if they failed to put in their claim within the time allowed by law; originally this was a year and a day only from the time of levying the fine (*yy*). But this barring of the right by non-claim was abolished for a time by 34 Ed. I. c. 16, which admitted persons to claim and falsify a fine

(*y*) Reduced to once in each term by 31 Eliz. c. 2. It was the duty of the 'chirographer' of fines every term to write out and exhibit a table of fines levied in each county: 2 Bl. 352.

(*yy*) See statute 18 Ed. I., quoted 2 Bl. 354.

at any indefinite distance: "whereby," as Sir Edward Coke observed, "great contention arose, and few men were sure of their possessions, till the Parliament held 4 Hen. VII., confirming 1 Rich. III. c. 7, reformed that mischief, and excellently moderated between the latitude given by the statute and the common law." For while the statute restored the doctrine of non-claim, it only barred the right of strangers in case they had not made claim within five years after proclamation made (*z*). It had been expressly provided by the Statute De Donis that a fine levied by the tenant in tail should not bar the issue; but by 32 Hen. VIII. c. 36, it was enacted that when levied with proclamations according to 4 Hen. VII. c. 24, by any person of full age to whom or to whose ancestors lands had been entailed, whether they were in possession, reversion, or remainder, it should be a perpetual bar to them and their heirs claiming by force of such entail (*zz*), and the bar was immediate (*a*). But that statute did not extend to bar those either in remainder or reversion; they had still a right of entry or of action on the death of the tenant who had levied the fine, and failure of his issue. Though in modern times fines have always been levied with proclamations, yet trouble and expense were often incurred in procuring evidence that they were so levied; it was therefore provided by 11 & 12 Vict. c. 70, that all fines theretofore levied in the Court of Common Pleas should be conclusively deemed to have been levied with proclamations (*b*).

Abolition of fines and recoveries.

Both fines and recoveries have now been abolished by Act of Parliament (*c*), called the Act for the Abolition of Fines and Recoveries. In order, however, to a due understanding of that Act, it is necessary to state further that a recovery to be operative always required that the recoveree (*i.e.*, the person against whom the action was brought, or 'tenant to the præcipe,') be actually possessed of the freehold (*d*). But a fine could be levied of an interest of a reversionary character. Thus, suppose land to have been settled upon A. for life, with remainder to B. in tail; during the subsistence of A.'s life estate no recovery could have been had by B., unless upon the concurrence of A. For a recovery to have been suffered in such case, the tenant for life A. (or any

(*z*) 2 Bl. 354.

(*zz*) 2 Bl. 355.

(*a*) Wms. 50.

(*b*) See 2 Bl. 352, for description of proceeding by fine, *Sur cognizance de droit come ceo*, &c., which was the usual one.

(*c*) 3 & 4 Wm. IV. c. 74.

(*d*) 2 Bl. 362.

Chap. II.

person whom A., having conveyed to him an estate of freehold, had made tenant to the præcipe) must have vouched B. the remainderman in tail, and he in turn have vouched the 'common vouchee' (*e*); while a fine might have been levied by B. notwithstanding the antecedent estate in A., and that fine would have been operative on the entail whenever it fell into possession. The recovery converted the estate into an absolute fee, while the fine only converted it into what was called a base fee, that is, a fee limited to the duration of the prescribed line of heirs on whom the lands were entailed. On the failure of these, had the process resorted to been a fine only, the reversionary interests limited on the expiration of the estate tail would have come into operation. Down to the passing of the statute which abolished fines and recoveries, and throughout the interval between that statute itself and the Statute De Donis, a fine and recovery were the only means known to the law for the destruction of entails. The Act, however, which abolished fines and recoveries, provided in substitution for this costly and circuitous procedure a new and simple assurance, in effect (subject only to the exceptions which will be pointed out) empowering all tenants in tail, whether in possession, remainder, contingency, or otherwise, not only to destroy the entail, but all estates expectant upon its termination; and either to acquire or to dispose of to others an estate in fee simple absolute, or for any less estate in the property. This is accomplished by the simple operation of a deed by the tenant in tail, enrolled in the Court of Chancery (now the Central Office of the Supreme Court) within six months from its execution (*f*). The exceptions referred to are tenancies in tail after possibility of issue extinct; entails granted by the Crown as the reward of public services, the reversion still remaining in the Crown (*g*); and (*h*) entails then subsisting in females of lands of their deceased husband or given by any of his ancestors, called '*ex provisione viri*,' but which, in modern times, had become obsolete, and for the future were abolished by the same Act (*i*). These exceptions are excluded from the operation of the Act, and the entail in them remains unbarrable.

Disposition by deed.

(*e*) So called from being frequently thus vouched, usually the cryer of the Court: 2 Bl. 359, and see 362.

(*f*) 3 & 4 Wm. IV. c. 74, ss. 15, 40, 41. And see Rules of the Supreme Court, Ord. LXA. r. 6.

(*g*) S. 18.

(*h*) S. 16.

(*i*) S. 17.

Protector.

In the case of an estate tail not in actual possession, but in remainder only expectant on the determination of some antecedent freehold interest, as in the example of a gift to A. for life, with the remainder to B. in tail, and A. living, the statute adopts the ancient principle of the old recovery enjoining the concurrence of the owner of the antecedent estate to enable a destruction, not of the entail itself, but of all remainders and reversions expectant upon it. This person it styles the Protector; but in lieu of him the settlor may appoint any number of persons *in esse* not exceeding three (*k*). So the tenant in tail may still, without the Protector's consent (as before the Act he could by levying a fine), bar his issue and create a 'base fee,' which estate, during the continuance of such issue, will be subject to his disposition, or descend to his heirs as a fee simple. Where the owner of a base fee becomes entitled to the immediate remainder or reversion in fee, as by the person entitled in remainder or reversion releasing his interest to him, the base fee is enlarged into as large an estate as the tenant in tail with the consent of the protector might have created. It was enacted:—

> S. 39. "That if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this Act, or at any time afterwards, be united in the same person, and at any time after the passing of this Act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail with the consent of the protector, if any, might have created by any disposition under this Act, if such remainder or reversion had been vested in any other person."

On the purchase, then, of lands from a tenant in tail, in order to the completion of the purchase it is necessary—it being essential to the validity of the deed as against the issue in tail, remaindermen, and reversioners—that the deed be enrolled within six calendar months after its execution by the vendor (*l*); and, if so enrolled, it will take effect from the time of execution, except as against persons claiming for valuable consideration under a prior enrolled deed (although subsequently executed) and without express notice of the estate created by the prior executed deed (*m*). If there be a protector of the settlement (that is, if the vendor be

(*k*) S. 32.
(*l*) S. 41.
(*m*) Ss. 38, 74.

Chap. II.

not tenant in tail in possession), and such protector's consent be given by a separate deed (that is, not by the conveyance itself or 'assurance,' as where there is a disentailing, the instrument is usually called), the consent deed must be executed on or before the day on which the assurance is made by the tenant in tail, and must be enrolled at or before the time at which the assurance is enrolled (*n*).

Where the tenant in tail in possession is a lunatic, the Lord Chancellor has a discretionary power to consent, as protector under the Act (*o*), to the first tenant in tail in remainder barring the entail (*p*).

A further question has arisen under the Act (*q*), namely, where there is a trustee and a *cestui que trust* of the prior estate, who shall be the protector of the settlement. Lord St. Leonards, many years ago, gave the opinion that the *cestui que trust*, that is, the person entitled under the settlement to the beneficial enjoyment of the rents and profits, is the owner under the statute, and therefore the protector to consent to barring the entail. That opinion has been acted on by conveyancers for forty-five years, and now, after a fruitless attempt to prove it incorrect, the opinion has received judicial sanction in a late case (*r*).

Family settlement.

The principle, both of the old law of the recovery and the modern one of the statute, in requiring, in the case in which the entail is of a reversionary nature, the concurrence of the party in whom the preceding estate of freehold is vested, is only in conformity with a habit which has always prevailed among the landed aristocracy of England, and which has been regarded as an essential element to the existence of a landed aristocracy (*s*). Almost entirely among the noble, and to a great extent among the higher classes generally of England possessed of landed estates, with the view of preserving the succession so far as practicable in the male line, and in its eldest branch, the course

(*n*) Ss. 42—46.

(*o*) S. 22.

(*p*) This was decided in *Re Blewitt*, 6 De G. M. & G. 187, overruling earlier decisions. See Dart's V. & P. 687—8.

(*q*) S. 22.

(*r*) *In re Dudson's Contract*, L. R. 8 Ch. D. 628. See also *Clarke* v. *Chamberlin*, L. R. 16 Ch. D. 176, in which trustees appointed protectors having died, the tenant for life, and not the new trustees, was held to be protector.

(*s*) Several forms of disentailing assurance are given in 2 Prid.—particularly one deed creating a base fee, and another by indorsement enlarging one; and form at p. 265 of Wolstenholme & Turner on Conveyancing Acts.

of family settlement is (subject to a provision for a wife, younger sons, and the daughters), to limit the estate in the first instance to the male stock of the family for his life, with remainder after his death to his eldest son in tail, or failing that entail to the second and other sons in tail in succession, with other family remainders over. Either on the attainment of majority of the eldest son or his marriage, the estate is resettled, reserving to the father his original estate for life, abridging the estate tail of the son by converting it into an estate for life expectant on the death of the father, with probably some rent charge by way of intermediate allowance, and then on his own (that is the son's) death (subject to the like provision for his wife and younger sons and his daughters as took place in the case of his father) limiting the estate again upon his eldest son in tail with remainder to his second and other sons in succession, in like manner as had been done on the occasion of the original settlement. In this course of settlement the father, for the time being in possession as tenant for life, is the protector of the settlement; and accordingly, without his concurrence, not only could no settlement be made, but the eldest son or whoever else might be the tenant in tail in remainder, would during his father's lifetime have no power of dealing with any greater extent of ownership than for his own estate tail, and could not cut off the remainders expectant on its termination. Under the old law this condition of things was accomplished by the principle which required the concurrence of the owner of the first estate in possession in the recovery as essential to its validity; and the protectorate established by the statute but carries out that principle (*t*).

The great object in this course of settlement is to tie up the estate for the longest period consistent with the rules of law, namely, by giving estates to the unborn children of living persons; in an ordinary family settlement this secures an inalienability at all events for the life of the first taker, the father, and the attainment of majority of the eldest son: when, by the process of the re-settlement, fetters are again thrown upon the alienation and tie the estate up for the lives of the father and the son, and up to the majority of the grandson.

An estate tail can now be barred only under the provisions of the statute, and in conformity with the formalities it prescribes.

(*t*) See Form, 3 Da. ii. 285.

Chap. II.

It cannot be barred either by contract or by testamentary disposition (*u*).

Settled Land Act, 1882. Sale—exchange.

A tenant in tail in possession is given the powers of a tenant for life under the Settled Land Act, 1882 (*x*), and therefore can in the same way sell or exchange the property the subject of the entail, the entail being transferred to the purchase money or the land taken in exchange (*y*); similarly a person entitled in possession to a base fee is given the powers of a tenant for life under the Act. Less ample powers of sale had been conferred by the Leases and Sales of Settled Estates Act, 1856 (*z*), and the Amending Acts, all of which were repealed and replaced by the Settled Estates Act, 1877 (*a*).

III. Incidents. Committing waste.

There were pointed out in the last chapter the restrictions which existed in the case of a tenant for life as to cutting down timber and committing waste. These do not apply to the tenant in tail, who may cut at his pleasure (*b*). In fact, this is but consistent with the nature of an ownership, which places the destruction of the interests of those claiming either under or after the entail at his mercy. The right could of course admit of practical exercise only by a tenant in tail in possession, for one in remainder could not enter to cut, &c.

Leases.

Prior to the Act for the abolition of fines and recoveries a tenant in tail in possession could only, under the enabling statute of Henry VIII. (*c*), make leases valid against his issue, but not against the remainderman or reversioner; but by that Act he is empowered to make a lease for twenty-one years from the date thereof, or not more than one year from such date, at a rack rent, that is, an ordinary current rent, or not less than five-sixth parts of it, without the necessity of enrolling the deed (*d*).

The statute of Henry VIII. (*e*) was repealed by the Leases and Sales of Settled Estates Act, 1856 (*f*), and the same power of leasing was given to the tenant in tail in possession (*g*), except where the entail was created by Act of Parliament (*h*), as to

(*u*) 3 & 4 Wm. IV. c. 74, s. 40.
(*x*) 45 & 46 Vict. c. 38, s. 58 (i.).
(*y*) See *ante*, chap. i. p. 55 *et seq.*
(*z*) 19 & 20 Vict. c. 120; see s. 15.
(*a*) 40 & 41 Vict. c. 18; see ss. 23, 24, and *ante*, chap. i. p. 54.
(*b*) 2 Bl. 115.
(*c*) 32 Hen. VIII. c. 28.
(*d*) 3 & 4 Wm. IV. c. 74, s. 41.
(*e*) 32 Hen. VIII. c. 28.
(*f*) 19 & 20 Vict. c. 120, s. 35.
(*g*) See s. 32.
(*h*) S. 42, re-enacted in 40 & 41 Vict. c. 18, s. 55; but see 45 & 46 Vict. c. 38, s. 58 (1) (i.).

tenants for life (*i*). This was continued by the Settled Estates Act, 1877 (*k*), which repealed and replaced the Settled Estates Act, 1856, and its amending Acts. And now, as in the case of sale and exchange, ampler powers have been conferred by the Settled Land Act, 1882 (*l*), which constitutes the tenant in tail in possession tenant for life for the purposes of the Act, and does away with the exception referred to, unless the land was purchased with money provided by Parliament in consideration of public services; similarly a person entitled in possession to a base fee, although the reversion is in the Crown, is made a tenant for life under the Act. Therefore in future, as before observed with regard to estates for life, all provisions in respect of leasing, as well as of sale and exchange, may in general be omitted in the instrument of settlement (*m*).

Debts.

Formerly lands entailed, when suffered to descend, were not liable to the debts of the deceased tenant in tail, except in respect of debts due to the Crown (*n*); for, though a tenant in tail has a larger estate than a tenant for life, as he has the inheritance in him, and may, when he pleases, turn it into a fee, yet, if he do not, at the instant of his death he has but an interest for his life (*o*). Under a statute, however, of the present reign (*p*), debts for which any judgment, decree, order, or rule exists, were made binding on the lands, not only as against the issue in tail, but all whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest; only for the judgment to affect any land it must have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority (*q*).

What was the meaning of 'actual delivery' was much doubted (*r*). In a recent case (*s*), James, L.J., thus expressed the law :—

"A judgment creditor, not being able to obtain relief at law under the old system" (that is, before the Judicature Acts) "because his debtor had nothing but an equitable interest in the land, came into a Court of Equity to obtain that relief which he could not obtain at law, and the

(*i*) See *ante*, chap. i. p. 54.
(*k*) 40 & 41 Vict. c. 18, ss. 23, 46 and 55.
(*l*) 45 & 46 Vict. c. 38, s. 58 (1) (i.).
(*m*) See *ante*, chap. i. p. 55 *et seq.*
(*n*) 33 Hen. VIII. c. 39.
(*o*) *Per* Ld. Hardwicke, *Paggot* v. *Gee*, 9 Mod. 482.
(*p*) 1 & 2 Vict. c. 110. See ss. 11, 13, 18, 19.
(*q*) 27 & 28 Vict. c. 112, see *post*, p. 103.
(*r*) See 1 Dart's V. & P. 476 *et seq.*
(*s*) *Ex parte Evans*, L. R. 18 Ch. D. 257.

Chap. II.

moment he established the difficulty in his way at law, and the Court made the order giving the right to the possession of the land to the receiver appointed on his behalf, that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of land in which the debtor had a legal interest. That return was, equally with the appointment of a receiver, a merely verbal delivery in execution."

Under the Crown Suits Act, 1865 (*t*), Crown debts are not to affect the land until writ of execution has been issued and registered, but from such time they will be bound (*u*).

Under the bankruptcy of a tenant in tail the entail may be barred by the trustee under the bankruptcy, and the estate disposed of for an interest commensurate with that which, under the Act for the Abolition of Fines and Recoveries, the tenant might himself have acquired; and the provisions of that Act relating to the lands of a bankrupt are applied to proceedings in bankruptcy under the Bankruptcy Act, 1869 (*x*).

Forfeiture.

Under the ancient Common Law of England, acts of the tenant in tail involving forfeiture only subjected the estate thereto during the subsistence of his own life. The issue, claiming not so much through him as through the original gift, *per formam doni*, were not affected by the forfeiture of their ancestor. This, so far as regarded the matter of treason, was varied by a statute of Henry VIII., which, addressed to estates of inheritance generally, under which entails were covertly included, declared all such estates forfeited to the king upon any conviction of high treason (*y*). The statute, however, was confined to treason; and on an attainder for murder the antecedent and ancient law prevailed; and thus, notwithstanding the attainder, the estate would devolve on the issue; but, as we have seen, from 4th July, 1870, forfeiture (unless consequent upon outlawry) has been abolished (*z*).

IV. Estates *pur autre vie*. *Quasi*-entail.

The general character of an estate *pur autre vie* was described in the last chapter. Should an estate of this description, instead of being given to the heirs generally, or to the executors, be given to one and the heirs of his body, he would

(*t*) 28 & 29 Vict. c. 104.
(*u*) S. 48.
(*x*) 32 & 33 Vict. c. 71, s. 25, § 4, applying 3 & 4 Wm. IV. c. 74, ss. 56—73.
(*y*) 2 Bl. 118. See *ante*, pp. 66, 68.
(*z*) 33 & 34 Vict. c. 23. See *ante*, p. 23.

take what is called a *quasi*-entail in it; that is, an estate in the nature of an entail; and, subject to the destruction of the entail, it would descend during its continuance in the same manner as an ordinary estate tail.

The owner, however, in possession of such an estate, may bar it by any ordinary deed of conveyance, and without the enrolment prescribed by the Act for the Abolition of Fines and Recoveries. Should the estate be one in remainder, however, expectant on a previous estate for life, the concurrence of the tenant for life would be necessary to enable the owner to defeat the subsequent remainders (*a*).

V. Personalty settled on trusts similar to estates of freehold.

As stated in a previous chapter (*aa*), there cannot be an estate in personal property, therefore there cannot be an estate tail in such property; a gift of personal property of any kind to A. and the heirs of his body, will simply vest in him the property given. And so in case of a settlement of freehold estates settled to the use of A. for life with remainder after his death to his eldest son in tail, and so on in succession; were the personalty settled on trusts to correspond with the uses of the freeholds, it would vest absolutely in the first tenant in tail of the realty immediately upon his birth, and the addition of the words 'so far as the rules of law and equity will permit,' makes no difference in this respect (*b*). But where it is desired that leaseholds and chattels (as plate, furniture, or pictures to be held as heirlooms), should be settled as freeholds in 'strict settlement,' as the kind of settlement to which we have alluded is called; this may be done to a certain extent, namely, by tying them up so as not to vest absolutely until the first tenant in tail to take attains twenty-one, when he being of age can resettle the whole. This is usually done by declaring that they are to go on trusts to correspond with the uses of the freeholds (or, if chattels, it may be expressed that they are to be treated as heirlooms), but so that they shall not vest absolutely in any tenant in tail by purchase until twenty-one, and in case of death under that age shall go as if they had been freeholds of inheritance included in the grant (*c*).

(*a*) *Edwards* v. *Champion*, 3 De G. M. & G. 202; and Wms. 59.

(*aa*) Chap. i. p. 38.

(*b*) 3 Da. i. 600.

(*c*) 3 Da. i. 602, 627; and see recent case of *Miles* v. *Harford*, L. R. 12 Ch. D. 691. For forms see, as to leaseholds, 3 Da. ii. 1130, and 4 Da. 435: as to chattels, 3 Da. ii. 1117, 1133, 1180, and 1224. The leading case on this subject is *Ld. Scarsdale* v. *Curzon*, 1 J. & H. 40.

Chap. II.

Leaseholds and heirlooms are sometimes (*d*), in order to insure their devolution in all events with the freeholds, settled by means of a trust for sale, and for reinvestment in the purchase of freeholds, to be settled to the same uses as the devised freeholds, with a power to postpone the sale, and a direction that the rents and enjoyment until sale shall belong to the persons who would be entitled to the rents of the substituted freeholds (*e*).

Settlement of realty by trust for sale.

In the case also of real property, where it is not wished to make a 'strict settlement,' but that the children should take equally, recourse is had to a trust for sale, whereby the real property is constructively converted into personalty. The mode and scope of such settlement is thus shortly described by Mr. Prideaux:—

"The proper mode is by conveying the property to trustees in trust for sale, and then settling the proceeds as personal estate, with a proviso that until sale the rents and profits shall be paid and applied in the same manner as the income of the proceeds would be applicable if a sale had been made. The trust for sale is mere machinery to effect a division of the property, without the necessity of the complicated and inconvenient limitations which would be necessary if the land were settled as real estate; and the settlor need not be afraid that by adopting this form the land is likely to be sold, for by making the trust for sale exercisable with the consent of the tenants for life, and after their death at the discretion of the trustees, he practically secures that there shall be no sale unless the exigencies of the family make one desirable" (*f*).

Such real property is 'settled land' within the meaning of the Settled Land Act, 1882, and the person (or persons) for the time being beneficially entitled to the income of the land till sale is the tenant for life, and the provisions of the Act are made generally to apply as in the case of a strict settlement (*g*). Therefore the trustees cannot sell without the consent of the tenant for life (*h*).

(*d*) 4 Da. 436, note (*k*).
(*e*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37; *ante*, p. 59.
(*f*) 2 Prid. 209; see also 4 Da. 7.
(*g*) 45 & 46 Vict. c. 38, s. 63.
(*h*) S. 56 (2).

CHAPTER III.

ESTATES IN FEE SIMPLE.

I. Distinction between estates for life, estates in tail, estates in fee.

We have now to consider the third and remaining classification into which, in point of quantity (that is, continuance or duration) estates are divided, namely, an estate in 'fee simple.'

An estate for life, as its name imports, is, we have seen, limited, by the duration of the life or lives for which it is holden. An estate tail so far partakes of the nature of one for life that, unless changed by its owner in its very nature, and, under the special provision enacted by Statute Law for the purpose, converted by him into an estate of a different character with ampler ownership, the control of the owner over it ceases on his death; it is not subject to his testamentary disposition; although it devolves on persons deriving their right of succession from their descent from him, it goes to the particular and prescribed class of heirs indicated by the original grant, and therefore their title is to be ascribed not so much to their representing their ancestor, as to their fulfilling the condition pointed out in the grant. An estate in fee simple on the contrary, though at first inalienable against the heir, who took as a nominee in the original grant, is now in its very creation an estate in perpetuity into whosesoever hands it comes; and it is not only subject to the alienation of the owner in his life by any of the ordinary assurances adapted to the transfer of real estates, and like the rest of his property to be reached in satisfaction of his debts, but it is subject also after his death to his debts, and is devisable by his will; and, if not devised, so long as there exist any heirs, whether lineal (in the ascending or descending line) or collateral heirs, male or female, proximate or remote, that is (*a*), of the last person entitled who acquired his title otherwise than by inheritance, or as it is called by 'purchase,' which includes a devisee, the estate will descend. In the case, however, of the last person entitled being a bastard, the estate can only descend in case of his death intestate to his

(*a*) Subject to the one case provided for by 22 & 23 Vict. c. 35, s. 19; see *post*, p. 131.

Chap. III.

lineal issue, for he is in law *filius nullius*, and therefore cannot have heirs in the ascending line or collateral. Only in the event of a total failure of heirs and the last owner dying intestate, will an estate in fee simple come to an end, and escheat to the Crown. In ancient days, the escheat would have enured to the immediate chief lord of the fee; but now mesne tenure having generally disappeared (for the Statute of Quia Emptores, by forbidding the creation of them in future, made all seignories bear date antecedent to the Statute (*b*), and so by lapse of time the means of tracing them is generally lost), the Crown would take, upon the feudal principle which still assigns to the Sovereign the lordship paramount of the whole soil of the country.

Origin of the term 'fee.'

The term 'fee' is taken from the Latin word '*feodum*,' and means the same as a fief or feud. In its origin it was used in opposition to 'allodial,' and indicated the feudal character of the holding. It is now used to signify an estate of inheritance, and a 'fee simple' is merely spoken of in opposition to a 'fee tail.' As Lord Coke says:—

> "'Simple' is added, for that it is descendible to the heirs generally, that is, simply, without restraint to the heirs of the body or the like" (*c*).

It is the greatest estate or interest which the Law of England allows any subject to possess in landed property.

Words of inheritance.

In the last chapter it was pointed out that, in the instance of the creation of an estate tail by deed, the use of words referring both to inheritance and to procreation was necessary to create an entail (*cc*). In the case of a fee simple, words of inheritance alone were requisite; that is to say, in every conveyance of an estate in fee simple, for the purpose of marking out, or 'limiting,' the estate, the use of the word 'heirs' was necessary. Where, however, by a will the intention was apparent to pass an estate in fee simple, the Courts, notwithstanding the absence of words of inheritance, would construe the devise to be of an estate in fee simple, even prior to the Wills Act. And the reason of this, as expressed by Blackstone, was, that wills, being often drawn up when the party is *inops concilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice (*d*). It was, how-

(*b*) A.D. 1290. See *ante*, p. 34.
(*c*) Co. Litt. 1*b*, ed. by Thomas, vol. i. 489; and see *ante*, p. 19.
(*cc*) *Ante*, p. 63.
(*d*) 2 Bl. 172.

ever, presumed, unless the contrary was manifest from the context, that in the absence of words of inheritance the testator's intention was only to confer a life estate. The Wills Act (*e*) has reversed that presumption, and has enacted that, unless a contrary intention shall appear by the will, a devise of real estate shall be construed to pass the fee simple (or other the whole estate or interest which the testator had power to dispose of by will). Thus, if by deed a man were to convey an estate, of which he was owner in fee, in the form of a gift to A. B., as distinguished from one to A. B. and his heirs, A. B. would take only for life, and that notwithstanding the gift was to A. B. for ever, or to him and his assigns for ever (*f*). If he had done the same by will, previously to the late statute, A. B. would still have taken only for life, unless he could satisfy the Court from the general context of the will that it was the testator's intention to confer on him an estate in fee; as, where the devise was to A. B. in fee simple, or to him for ever, or to him and his assigns for ever; or the devise was of all the testator's estate, or of all his property, or all his inheritance (*g*). Whereas since the Wills Act, A. B. would be presumed to take an estate in fee, unless the parties interested to dispute it could establish to the satisfaction of the Court, in like manner from the context, that he was not to take one—in other words, unless they could rebut the presumption. The principle on which the necessity of mentioning the heirs was founded, is to be looked for in the feudal system, under which the inducement to a gift of lands was the personal ability of the donee to perform the services; and even after such lands descended to the heirs after the death of the original donee, they could only descend when the heirs were mentioned in the gift (*gg*). In the case of a grant of lands in fee simple to a corporate body, in respect of which there can be no inheritance but only succession, the word 'successors' took the place of 'heirs.'

Now under the Conveyancing and Law of Property Act, 1881, in regard to deeds executed after the 31st December, 1881, it will be sufficient in the limitation of an estate in fee simple, to use the words 'in fee simple' without the word 'heirs' (*h*). And presumably, as person includes a corporation (*i*), it will be sufficient so to

(*e*) 1 Vict. c. 26, s. 28.
(*f*) 2 Bl. 107.
(*g*) 2 Jarman on Wills, 274.
(*gg*) 2 Bl. 108.
(*h*) 44 & 45 Vict. c. 41, ss. 51 and 1, and see 3rd form to 4th sched. See *ante*, p. 64.
(*i* S. 2, xvii.

Chap. III.

limit such estate to a corporation without the use of the word 'successors.'

1. Fee simple absolute.

Estates in fee simple have been divided into three classifications —(1), absolute; (2), qualified or base; and (3), conditional (*k*).

The term 'fee simple absolute' speaks for itself. It is the ordinary unqualified ownership of a man and his heirs in perpetuity.

2. Qualified, or base fee.

A 'qualified' or 'base fee' is where a qualification is annexed to the estate, so that it must determine whenever the qualification is at an end. Until such time the proprietor has all the rights and privileges of a tenant in fee simple. The right of holding the lands will continue for ever, unless by the rise of the event marked by the words of the qualification it be determined (*l*). The nature of a base fee will be best understood by illustration. A grant to A. and his heirs, tenants of the Manor of Dale, is a base fee. It is not an absolute one, because it has the qualification attached to it that there shall be a concurrent tenancy of the Manor of Dale. Were the concurrent tenancy of the Manor to come to an end, the estate granted to A. and his heirs would also come to an end. But so long as the qualification—that is, the concurrent tenancy—continues, A. and his heirs or assigns will have all the rights and privileges of a tenant in fee simple.

We have seen in the last chapter an instance of a base fee, in the case of a tenant in tail in remainder, for want of the protector's consent, acquiring or disposing of a fee simple limited only to the period during which, but for the destruction of the entail itself, the entail might have lasted; that is, during the existence of issue of the original heir of succession (*ll*). Lord Coke says:—

"A parson or vicar, for the benefit of the Church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to do anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life" (*m*).

3. Conditional fee.

"A conditional fee at the common law," says Blackstone (*n*), "was a fee restrained to some particular heirs, exclusive of others. . . . . It was called a conditional fee, by reason of the condition expressed or implied in the donation of it—that, if the donee died without such particular heirs, the land should revert to the donor."

(*k*) Co. Litt. 1*b*, ed. by Thomas, vol. i. 490—507; and 2 Bl. 109.

(*l*) Co. Litt., note by Thomas, vol. i. 490, 507.

(*ll*) *Ante*, p. 73.

(*m*) Coke Litt. 341*a*, ed. by Thomas, vol. i. 105. See *per* M. R. in *Mulliner* v. *Midland Rail. Co.*, L. R. 11 Ch. D. 622.

(*n*) Vol. ii. 110.

It was such conditional estate as (we have seen) was converted by the Statute *De Donis Conditionalibus* into an estate tail. Later, the estate given, under what was (*nn*) the common form of a mortgage in fee, to a mortgagee, in its inception was called a conditional fee; the conveyance, though absolute in form, was subject to a provision or condition that if on or before a certain day (usually fixed at one year or less from the date of the security) the mortgagor repaid the mortgage money the conveyance would be void. If the day passed without payment, at Common Law the estate of the mortgagee, originally conditional, would have become absolute, whatever the relief or power of redemption a Court of Equity might afford (*o*).

II. (*a*) Alienability.

Every estate in fee simple is, under the now existing state of the law, subject to alienation by its owner in his lifetime; or to be operated on by his testamentary disposition after his death: and this is so as to the entire estate. This, however, must be taken with the qualification that the alienation is effected by such assurances as are recognised by the law, and that the disposition itself does not contravene its general policy; and it may be not only to the full extent of the interest which is vested in the tenant himself, but for any smaller estate.

Inter vivos. By deed.

The consideration of the nature and operation of these assurances is reserved for a later chapter (*p*), but it may be here stated that in the case of an alienation during the lifetime of the owner —one, as it is termed '*inter vivos*'—the prescribed assurance is a deed. The beneficial interest may indeed be bound by a less formal writing—under special circumstances, without even any writing at all, *e.g.*, to create an estate at will—but for the legal transfer of the estate itself, the divesting from one party and the vesting it in another, a document under seal, in other words a deed, is required.

Formerly at common law, the conveyance of an estate in possession was by a feoffment accompanied with livery of seisin (*q*), and it was only by the Statute of Frauds (*qq*) that it was made necessary that this should be evidenced by writing signed by the party, or his agent by writing lawfully authorised. Estates in

(*nn*) Now the common form is to convey absolutely to the mortgagee, subject to a proviso that he will reconvey upon payment on a given day. See *post*, p. 174.

(*o*) Fisher on Mortgages, § 6 (3rd ed., § 10).

(*p*) Chap. x.

(*q*) *Ante*, p. 20.

(*qq*) 29 Car. II. c. iii. s. 1.

Chap. III.

expectancy (that is, remainders and reversions) and incorporeal hereditaments were transferred by deed of grant, and they were said to 'lie in grant,' but estates in possession to 'lie in livery.' But by the Act to amend the Law of Real Property (*r*), it is enacted that after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold, be deemed to lie in grant as well as in livery; and a feoffment made after that date (other than a feoffment made under a custom by an infant) (*s*) shall be void at law unless evidenced by deed: so that a simple deed of grant became the ordinary form of conveyance of freehold lands, whether in possession or in expectancy.

Since the coming into operation of the above Act, it has become the practice to use the word 'grant' in conveyances of freehold land. By the Conveyancing and Law of Property Act, 1881, it has been declared that in regard to conveyances made before or after the Act, the use of the word 'grant' is not necessary in order to convey tenements and hereditaments, corporeal or incorporeal (*t*). The word 'convey' will probably be used (*u*). Certain short forms of conveyance were authorised by 8 & 9 Vict. c. 119, but these did not commend themselves to the profession, and were not adopted (*x*). Also the Lands Clauses Consolidation Act (*y*) contains a statutory form of conveyance, which though optional, has a special efficacy (*z*).

Further, if the property be subject to the operation of any of the local registration Acts, a memorial of the conveyance should be registered as soon as practicable after execution (*zz*)—that is to say, if the premises are situate in the county of Middlesex (exclusive of the City of London), or in the North, East, and West Ridings of Yorkshire, or in the town and county of Kingston-upon-Hull, or form part of the great level of the fens called Bedford Level. But there is no general registry (*a*).

But in addition to the ordinary mode of conveyance, a short statutory form of deed was given by the Legislature in 1862, by

(*r*) 8 & 9 Vict. c. 106, ss. 2 and 3.

(*s*) And such feoffment must be evidenced by a deed or writing signed by the infant's own hand. (2 Da. i. 245).

(*t*) 44 & 45 Vict. c. 41, s. 49.

(*u*) See s. 2 (v.), s. 57, and forms in 4th schedule.

(*x*) See Dart's V. & P. 504.

(*y*) 8 & 9 Vict. c. 18.

(*z*) See s. 81.

(*zz*) Dart's V. & P. 678 *et seq.*; see *post*, p. 104.

(*a*) As to the hardship often produced by the want of one, see *per* James, L. J., in *Teasdale* v. *Braithwaite*, L. R. 5 Ch. D. 631.

an Act to facilitate the transfer of freehold lands (and leaseholds), which might be used for the transfer of lands, the title to which had been registered under the provisions of the Act (*aa*). This Act was superseded by the Land Transfer Act, 1875 (*b*), under which the registration of title by the proprietor is, as under the former Act, optional; but if registered, the lands may be transferred in manner to be prescribed by rules under the Act (*c*), and the transfer is to be completed by the registrar entering on the register the transferee as proprietor of the land transferred (*d*).

Will.

In the case of a disposition operative only after death, the assurance is by an instrument called a 'Will,' for which statute law has prescribed (as will be seen later) an execution in accordance with certain solemnities, and a certain number of witnesses.

Growth of power of alienation.

The power of alienation is an encroachment on the original principle of the old feudal grant, the estate taken under which, even when descendible to heirs, was not at first treated as alienable, at all events not without the lord's consent. The process of subinfeudation, indeed, which has been described (*dd*), by degrees, though to a limited extent only, broke in upon this principle. Still, under that system, the party seeking to alienate retained an interest, namely, in the services demanded by him of his subinfeudee, while the lands themselves remained subject to the charge to which he himself was liable (*e*), at least, in name, though the practical difficulty of enforcement was one of the considerations which led to the Statute of Quia Emptores (*f*), by which subinfeudation was abolished. That statute, however, in abolishing subinfeudation, expressly adopted the principle of alienation, declaring that thenceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements, or any part thereof; although it went on to provide that the purchaser should hold the lands direct from the same chief lord of the fee, and by the same services, as his (the lord's) feoffee held them before. The statute did not extend to those who held of the king as tenants *in capite* from the Crown; yet these, though

(*aa*) 25 & 26 Vict. c. 53.

(*b*) 38 & 39 Vict. c. 87. See Appendix.

(*c*) Ss. 111, 29, 4.

(*d*) For the causes of the failure of the Act of 1862, see 2 Dart's V. & P. p. 1150; and, for a sketch of its provisions, and of the Act of 1875, see *ib.* ch. xix.

(*dd*) See *ante*, pp. 19, 33.

(*e*) Wms. 41.

(*f*) 18 Ed. I. c. 1.

Chap. III.

kept in restraint some time longer, ultimately acquired liberty of alienation (*g*).

The Statute of Quia Emptores, it will be observed, merely conferred a power of sale, in other words, of alienation *inter vivos*. That of testamentary disposition, or of gift by 'devise,' as it was termed (*h*), was so far a matter of later growth that, though it had existed in the earlier times of the Saxons, it had given way under the influences and the prohibitions of the feudal system; and while surviving (as we have seen (*hh*)) under the customs of Borough-English and Gavelkind, and in particular localities, as London and a few other favored places (*i*), under the control of a special custom, this was the exception, and not the rule.

In a country in which any given state of the law is opposed to the exigencies of society and the rational impulse of the community, though the law is pretty sure to give way at last, legal astuteness is equally certain to be alive in the interim to baffle its operation. Thus, an ingenious contrivance was resorted to in order to evade this restrictive operation of the law; and while wills were not allowed, the power of devising lands was acquired, but under another name. It was effected thus: a feoffment of the lands was made to some friendly party—originally, perhaps, under secret instructions to hold them at the disposal by will or otherwise of the feoffor, or party conveying, and afterwards openly—to hold the lands to such uses as the person conveying should appoint by his will. And these last wills were enforced in Chancery as for declarations of the use. Thus, through the medium of uses, the power of devising was continually exercised in effect and reality. The Statute of Uses, which will form the subject of separate notice hereafter (*k*), for a time, though but a short one only, extinguished this device, since that statute enacted generally that in the instance in which one party was seised of lands (that is, a conveyance had been made to him of them) to the use of another, the party who had the use should be deemed in

(*g*) Wms. 62; but see 1 St. Bl. 234, note. *Ante*, p. 34.

(*h*) "'*Deviser*,' says Lord Coke, "is a French word, and signifieth to speak. In law most commonly '*ultima voluntas in scriptis*' (*i.e.*, last will in writing) is used where lands or tenements are devised; and '*testamentum*' when it concerneth chattels." (Co. Litt. 111*a*, ed. by Thomas, vol. ii. p. 636.) Hence the common expression 'last will and testament.'

(*hh*) *Ante*, pp. 28, 29.

(*i*) Wms. 62.

(*k*) A statute passed in the reign of Henry VIII. (27 Hen. VIII. c. 10). See *post*, ch. ix.

lawful seisin and possession of the lands for such estate as he had in the use—in other words, be recognised as the real owner. The statute by "transferring the uses into possession" made them legal estate, which was not devisable. In the same reign, however, after the short interval of five years only, the power of disposition was partially revived under the Statute of Wills (*l*), which conferred a power of disposition, as regarded lands held under the then subsisting tenure of chivalry, over two-thirds of the property, and as regarded those held in socage, over the whole. The effect of the subsequent statute of Charles II. (*m*), abolishing military tenures, and converting all the land of the country held for a freehold interest into free socage, virtually brought the whole landed property of the country, except copyhold, within the purview of the Statute of Wills; and so the holder of an estate in fee simple acquired the power of devise over the whole of his lands.

By the Statute of Frauds, seventeen years later (*n*), to the validity of a will attestation was made necessary, and that by three or four credible witnesses. And such was the state of the law till 1837, when the Wills Act (*o*) was passed, as to all wills executed on and after 1st January, 1838; and such it still is in regard to wills executed before that date. From 1st January, 1838, the devise or alienation by will of estates in fee simple has been regulated by that Act, which was amended as regards the position of the testator's signature by the Wills Act Amendment Act, 1852 (*p*). The necessity for attestation required by the Statute of Frauds is retained, but there need not be more than two witnesses.

Alienation not to contravene general policy of the law.

It was stated (*pp*) that one of the conditions to which the free power of alienation is subject is that the disposition of the property should be of a character not contravening the general policy of the law; and by 'policy of the law' is meant those principles of jurisprudence which underlie and form part, as it were, of the institutions of the country, and which might perhaps be more correctly described as policy of state rather than of technical law. On this subject Jessel, M.R., has said (*q*):—

"You cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposition, and does not comprise such

(*l*) 32 Hen. VIII. c. 1, explained by 34 & 35 Hen. VIII. c. 5.
(*m*) 12 Car. II. c. 24; *ante*, p. 34.
(*n*) 29 Car. II. c. 3, s. 5.
(*o*) 1 Vict. c. 26.
(*p*) 15 Vict. c. 24.
(*pp*) *Ante*, p. 85.
(*q*) *Besant* v. *Wood*, L. R. 12 Ch. D. 620.

Chap. III.

and such another: that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman also, might think against public policy, another might think altogether excellent public policy. Consequently, it is impossible to say what the opinion of a man or a judge might be as to what public policy is. For a great number of years, both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilised country could no longer exist if such agreements were enforced by Courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court, although the consequence might be that they would live separately; and that was the view carried out by the Courts when it became once decided that separation deeds *per se* were not against public policy."

Mortmain.

A prominent instance of such a condition, namely, that the alienation must not be contrary to public policy, and dating from a very early period of the history of English law, is the prohibition of such alienation as would withdraw the property from ordinary transferability, or, as it is sometimes called 'circulation,' and lock it up in the hands of some one body invested with the character of a perpetual succession. In the emphatic and curt designation of the old law, the old Norman French of the day, this was termed (as we have seen) putting the land into 'mortmain,' or 'dead hand.' Bodies of the character here referred to are what are called 'corporations,' or bodies corporate; and these are 'ecclesiastical' or 'lay,' 'aggregate' or 'sole'; their distinguishing characteristic being their existence or succession in perpetuity. Their nature will be best understood by illustrations. A very early, if not the earliest, form of their existence, was a monastery—a body of individuals associated together in common brotherhood, and acquiring common property for the purposes of religion; the establishment of a religious house consisting of a brotherhood of monks or priests with a priest for their head: vacancies occurring in their body, as by death, were from time to time filled up, so as to keep up a perpetual existence. Monasteries were dissolved in England *temp.* Hen. VIII., but there may be a cathedral or church with a body of clergy attached to it called canons, and a head termed a dean, possessed of lands devoted to the keeping up of the Church, the performance of its religious services, and the maintenance of

Corporations—ecclesiastical, lay—aggregate, sole.

the priests; vacancies in their body being filled up as they from time to time arise. These would be called 'ecclesiastical corporations.' A 'lay corporation' would exist, for instance, where a grant had been made by the Crown conferring the local government of some particular town or city, with appropriate provisions, upon some special sections of its inhabitancy, as, for instance, on a mayor, aldermen, and burgesses; or, where a grant had been made to some community of individuals associated together for purposes of commerce and profit, with some governing body or directors for the management of their affairs, and with provisions as vacancies occurred for recruiting the number and preserving the society in its original compactness. As examples of the former of these two, the corporations of London, Bristol, &c., may be cited—of the latter the old East India Company and other old trading companies.

The corporations instanced—whether ecclesiastical or lay—would be 'corporations aggregate.' A 'corporation sole' consists of one person only, and his successors—for instance, a sovereign, a bishop, a parson, or vicar; the office of each one, instead of ceasing on his death or withdrawal, would again be filled up under a prescribed obligation in favour of another; it is perpetual, and the rights and possessions attached to it are inseparable from it.

Now, it is obvious that the placing property, dedicated to military services, as under the feudal system, in the hands of bodies of this nature, would be to annihilate the services themselves; and, as regards other obligations not of a military character on the holder of lands, to transfer the lands to a corporation would be to deprive the lord of the benefits to be derived from them in the hands of his tenants—namely, his wardships, reliefs, escheats, and other advantages, the incidents of his seignory. But these considerations, however weighty with lords, weighed but lightly against the inclinations of tenants, who were easily prevailed on by the ecclesiastics to make grants of lands to the Church for what they termed 'pious uses.' The result was, that within two centuries of the Norman Conquest, a very large portion of the lands of the country previously dedicated to feudal services had got into the hands of ecclesiastical corporations as representing the Church.

Statutes of Mortmain.

The interest of the lords procured the enactment of a series of Statutes, called Statutes of Mortmain, addressed to the remedy of these grievances, and the restoration of the lords' former

Chap. III.

position. The first legislative enactment against such alienations was contained in Magna Charta, 9 Hen. III. c. 36 (*r*). The attempted evasion of this on the part of the ecclesiastics by taking long leases for years, which first introduced those extensive terms, led to the Statute De Viris Religiosis (*t*), which provided that no person, religious or other whatsoever, should buy or sell, or receive under pretence of a gift or a term of years or any other title whatsoever, or should by any act or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture. The ecclesiastics, backed by the astuteness of the lawyers, long struggled to evade the enactments against the alienation of land in mortmain. Among other devices they hit upon a new mode of conveyance, namely, not to themselves directly, but to a nominal feoffee to the use of the religious house, they then taking the profits while the feoffee had the seisin or possession; the Court of Chancery (then under the direction of the clergy) holding the feoffee bound to account for the profits to the *cestui que use* (*u*). This device was got rid of by 15 Rich. II. c. 5, in which statute for the first time the doctrine of mortmain is applied to guilds or fraternities, and mayors, bailiffs, and commons of cities, boroughs, and other towns *nominatim* (*x*).

And now no lands can be held by a corporation except by licence from the Crown, or under special statutory powers (*y*). The power of the Crown to grant such licence is a very early principle of the common law, and is stated to have had existence even before the Norman Conquest, in the time of the Saxons (*z*). However that may have been, the power to grant licences, notwithstanding the Statutes of Mortmain, was soon established.

Licence from the Crown.

Under those statutes an alienation in mortmain operated as a forfeiture of the land, and gave a right to the mesne lords and the king to enter upon and seize them; but, if such right was waived, the alienation was good. When a tenant could not alien without the consent of his lord, the licence must have been from the immediate lord, the mediate lords (if any), and the king (*a*). A mode of applying for licence from the king was prescribed (*b*).

(*r*) Shelford on Mortmain, 5.
(*t*) 7 Ed. I. st. 2.
(*u*) 2 Bl. 271.
(*x*) Shelford, 17.
(*y*) 1 Prid. 190.
(*z*) Shelford, 35.
(*a*) Shelford, 35.
(*b*) 27 Ed. I. st. 2.

The pretended power of the Crown of superseding or dispensing with laws, or the execution of laws, without consent of Parliament having been declared illegal by 1 Wm. & Mary, c. 2, it was thought prudent to confirm by Act of Parliament the king's power of granting licences in mortmain; and as, by the long operation of the Statute of Quia Emptores, mesne lordships had mostly disappeared, it was provided by 7 & 8 Wm. III. c. 37, that the Crown at its discretion might grant licences to alien or take lands in mortmain, and they should not be subject to forfeiture (*c*).

Charters of incorporation usually contain a clause declaring that the intended corporation shall for ever thereafter be able and capable in the law and have power (notwithstanding the Statutes of Mortmain) to purchase, hold, and enjoy to them and their successors any lands, tenements, and hereditaments whatsoever (to specified value), without incurring the penalties or forfeitures of the Statutes of Mortmain or any of them (*d*).

By statute.

Statutory powers to purchase and hold lands without licence in mortmain have been given to incorporated charities (*e*). By the Charitable Trusts Act, 1853 (*f*), and subsequent statutes (*g*), all endowed charities, including schools, are placed under the control of the Charity Commissioners; and to facilitate the incorporation of trustees of charities established for religious, educational, literary, scientific, or public charitable purposes, power has been given by the Charitable Trustees Incorporation Act, 1872 (*gg*), to the Commissioners, on the application of the trustees of any such charities, to grant to them a certificate of registration as a corporate body. Statutory power has also been given to joint stock companies registered under the Joint Stock Companies Acts to hold lands (*h*); but it is enacted:

> S. 21. "No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land."

Similarly, by the Public Health Act, 1875 (*hh*), urban and rural

(*c*) Shelford, 39.
(*d*) Shelford, 40.
(*e*) By 18 & 19 Vict. c. 124, s. 35, and 33 & 34 Vict. c. 34.
(*f*) 16 & 17 Vict. c. 137.
(*g*) Namely, 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; 32 & 33 Vict. c. 110; 37 & 38 Vict. c. 87.
(*gg*) 35 & 36 Vict. c. 24.
(*h*) See 25 & 26 Vict. c. 89; The Companies Act, 1862, ss. 18 and 191.
(*hh*) 38 & 39 Vict. c. 55.

Chap. III.

authorities are empowered to purchase and hold lands for the purposes of the Act.

Mortmain Act.

The principle of the ancient statutes against alienation in mortmain has been extended in more modern times to a mischief of somewhat analogous, though not altogether identical, character. A statute of the reign of George II. (*i*), commonly, though improperly, called 'The Mortmain Act' (*ii*), based on the impolicy of allowing gifts, under the name of charity, to be made by persons in view of approaching death, to the disinheritance of their lawful heirs, prohibits, except in the instance of a few favored institutions—viz., the Universities of Oxford and Cambridge, and their colleges, and the colleges of Eton, Winchester, or Westminster—all alienation of lands for charitable purposes otherwise than by deed indented and executed in the presence of two or more witnesses, twelve months before the death of the donor, and enrolled in Chancery within six months after its date (*k*). It was also required that the deed should take effect in possession immediately from the making thereof, and without power of revocation or any reservation for the benefit of the grantor or persons claiming under him. The Act, however, contained a saving clause as regards deeds of conveyance for value, when the purchase had been really and *bonâ fide* made for full and valuable consideration, at or before the making of such conveyance. In such case, it was not essential that the deed should have been executed at least twelve months before the death of the grantor (*kk*). By 24 Vict. c. 9, the necessity of the deed being indented was done away; it was permitted to make reservations in the grant, as of a nominal rent, or of minerals, &c., or covenants as to building, &c.; and the necessity of enrolling the deed of conveyance was done away where the charitable purposes were disclosed by a separate deed, provided this were enrolled in Chancery within six months of the perfecting of the deed of conveyance. By 27 Vict. c. 13, s. 4, it is provided that the full and valuable consideration, which exempts a purchaser from the operation of the Mortmain Act, may consist wholly or in part of a rent reserved. By 31 & 32 Vict. c. 44, s. 8, it is provided that thenceforth no deed need be acknowledged in

(*i*) 9 Geo. II. c. 36.

(*ii*) Shelford, 21. This and subsequent statutes are erroneously styled 'the Statutes of Mortmain' in 34 Vict. c. 13, s. 4.

(*k*) The Act contains corresponding provisions in respect to money, stock, or other personal estate to be laid out in the purchase of them.

(*kk*) 9 Geo. II. c. 36, s. 2; explained by 9 Geo. IV. c. 85.

order that it may be enrolled. And by the Rules of the Supreme Court the enrolment must now be in the Central Office (*l*).

It is evident that under the provision of the above Acts, every testamentary disposition of land for charitable uses is void.

The Legislature has provided for the enrolment of "deeds, assurances, and other instruments," relating to charitable trusts made prior to the Mortmain Act; and further for the enrolment of instruments, where the original deeds have been lost, or where they have not been enrolled in proper time, provided that the conveyance was really and *bonâ fide* made for full and valuable consideration, and possession is being held thereunder (*m*).

Gifts to superstitious uses.

Before passing from this subject reference should be made to alienations to what are called 'superstitious uses,' which are also void by the general policy of the law—thus, a gift by a testator, the object of which is not charity, but to secure a benefit to the testator himself, as to say masses for his soul, to keep up his tomb, &c., would be void, but his own representative (who would be entitled in the absence of such gift), and not the Crown, would be let in (*n*). By 1 Ed. VI. c. 14, the king was declared entitled to all real and certain personal property "theretofore" disposed of for the maintenance of persons to pray for the souls of dead men, &c.; such dispositions were declared to be superstitious, and, as such, void. By the previous statute, 23 Hen. VIII. c. 10, similar and other superstitious uses "thereafter" declared of land (except for terms of not more than twenty years) were made void. There is no statute making superstitious uses void generally.

Before the Mortmain Act (*o*), the law, while it rendered gifts to superstitious uses void, excepted gifts to charitable uses, and held them good being for a public benefit (*p*). In order to ascertain what are charitable purposes, recourse is usually had to the statute 43 Eliz. c. 4 (under which Commissioners were first appointed), which enumerates various kinds of charity; but they

(*l*) See Rules of the Supreme Court, Ord. LXIa, r. 6.

(*m*) 9 Geo. IV. c. 85; 24 Vict. c. 9, ss. 3, 4; 25 Vict. c. 17; 26 & 27 Vict. c. 106; 27 Vict. c. 13; 29 & 30 Vict. c. 57; and lastly by 35 & 36 Vict. c. 24, s. 13, which regulates the present procedure, viz., application to the clerk of enrolments, who must be satisfied "by affidavit or otherwise" of the facts, and that the omission to enrol has arisen from ignorance or inadvertence, or from destruction of the instrument by time or accident.

(*n*) 1 Jarman on Wills, 205, 211; *Re Blundell's Trust*, 31 L. J. Ch. 52; *Richard* v. *Robson*, 31 L. J. Ch. 897.

(*o*) 9 Geo. II. c. 36.

(*p*) *Per* Sir Thomas Plumer, M.R., *Mellick* v. *President, &c., of the Asylum*, Jac. 180; see 1 Jarman, 209, instances of charitable gifts.

Chap. III.

are not confined to this enumeration, they include all cases within the spirit of the statute. A gift for the erection of a monument to a testator, or for the repair of a tomb or vault to hold his remains, or for the interment of his family, is not charitable; and therefore a gift of lands for any such purpose is not void under the Mortmain Act, but as being for a superstitious use (*r*).

Exemptions from Mortmain Act.

Special exemptions from the operation of the Mortmain Act have from time to time been introduced in favour of particular objects, and a different procedure substituted in each case by the Legislature. The first extended to any quantity of land not exceeding one acre, intended as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge (*s*). Then, by the Literary and Scientific Institutions Act, 1854 (*t*), facilities were given for the conveyance of not more than one acre of land to be used as a site for institutions established for the promotion of science, literature, and the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs. Further provision has been made by the Religious, &c., Buildings (Sites) Act, 1868 (*tt*), for the acquisition of two acres of land by societies or bodies of persons associated together for religious, educational, literary, scientific, or other like charitable purposes as sites for buildings for such purposes.

Under the Recreation Grounds Act, 1859 (*u*), any lands may be lawfully conveyed to trustees to be held by them as open public grounds for the resort and recreation of adults, and as playgrounds for children and youth. Now, under the Public Parks, Schools, and Museums Act, 1871 (*x*), it is permitted to give, and that even by will or codicil, land or personal estate to be applied in the purchase of land, to the extent of twenty acres for any one public park, two acres for any one public museum, and one acre for a school-house for an elementary school, provided only that

(*r*) Jarman, 211. And see *Hoare* v. *Osborne*, L. R. 1 Eq. 585.

(*s*) 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49.

(*t*) 17 & 18 Vict. c. 112.

(*tt*) 31 & 32 Vict. c. 44.

(*u*) 22 Vict. c. 27.

(*x*) 34 Vict. c. 13.

the will or deed of the testator or grantor is made twelve months at least before his death, and is enrolled in the books of the Charity Commissioners within six months next after the time when it shall come into operation.

Lastly, by the Places of Worship Sites Act, 1873 (*y*), any quantity of land not exceeding one acre, and not being part of a demesne or pleasure ground attached to any mansion-house, may be conveyed as a site for a church, chapel, meeting-house, or other place of divine worship, or for the residence of a minister officiating in such place of worship or in any place of worship within one mile of such site, or for a burial place, or any number of such sites, provided that each such site does not exceed the extent of one acre.

Rule against perpetuities.

Another condition (*z*) is that the disposition of the property shall not be contrary to what is called the 'rule against perpetuities,' which prescribes certain limits within which only alienation may be had, or rather beyond which the acquisition of the absolute interest in, or dominion over, the property may not be postponed. The application of the rule is of daily occurrence in wills and settlements. The reason of the rule is in part common with that against alienation in mortmain; namely, to prevent the tying up of property in one particular course of succession, and thereby withdrawing it from ordinary transferability, and therefore from general circulation. Otherwise "that free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished" (*a*). Another reason of it is the possible embarrassments to the State which might result from toleration of the excessive aggrandizement of some one single person or family. Were property allowed to be tied up and wealth to accumulate in any one line, or in any one possessor, the personal influence and power it would attract to itself might have a tendency to disturb, if not altogether to derange, the State itself; for, however desirable it is to encourage the general growth of wealth in a community, it might under circumstances prove dangerous to allow any particular citizen to be put in that position

(*y*) 36 & 37 Vict. c. 50.

(*z*) See *ante*, pp. 85 and 89.

(*a*) Jarman on Wills, i. 250.

Chap. III.

of elevation above all others which might be the result of an inalienable possession and unrestricted accumulation.

Hence, as a general principle of the law, no one can make any alienation or settlement of his property which, as respects the *corpus* of it, would tie it up in a course of inalienability for a longer period than a life, or a series of lives, in being at the time of gift, and twenty-one years afterwards; or, to speak more accurately, twenty-one years with an allowance for a period of gestation, as it is termed, in cases where gestation exists (*b*). Thus, in the case in which it is sought to limit property after the expiration of some existing life to a party unborn at the date of the gift, as an ordinary principle it is necessary that the party designed to take should come into being at the latest within a period of twenty-one years from the termination of the life in question; only in the case of a posthumous child, that is one begotten at the termination of the life but not actually born, the law would allow a further period of a few months within which the child might be born. The creation of an entail is not at variance with this principle; for, though an entail unbarred might last for generations, it is always in the power of the tenant himself to destroy the entail and thus throw off the fetter. Thus, it is well settled that if there be a gift to A. for life, with remainder to B. in fee, with what is termed a 'shifting clause,' by which, in a certain event—as, taking the name or quartering the arms of the settlor or devisor—the estate is to shift from B. to another; unless that event must necessarily take effect within the prescribed limits, it is void for remoteness. But it is different where such a shifting clause is attached to an estate tail, because the power of barring the estate tail is a sufficient protection against perpetuity (*c*).

So stringent is the rule against perpetuity, that where a gift can possibly exceed the prescribed limit it is void. To take an instance: a testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares, the shares of such of his children

(*b*) *Cadell* v. *Palmer*, 7 Bligh, N. S. 202, H. of L.

(*c*) *Per* Kindersley, V.C., *Bennett* v. *Bennett*, 2 Dr. & S. 276.

or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters or the female issue of any deceased child to be settled as therein mentioned. It will be seen a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year; the widow might then die or marry, and such son might not attain twenty-four years within the legal period. And the rule is that a will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being. Consequently, the whole of the gifts after the life interest of the widow were void for remoteness; that is, they were contrary to the rule against perpetuities, and therefore void (*d*).

It will have been observed from this instance that the rule applies as well to personal as to real estate.

Accumulation of income (Thellusson Act).

What has been said applies to the *corpus* of the property; and down to the time of King George III. (A.D. 1800) and the Act of that reign, popularly known as the Thellusson Act (*e*), the income of property might have been rendered inalienable, in other words, subject to the obligation of an accumulation, for a period commensurate with that within which the *corpus* might be tied up. All that the law required was that the accumulation should not exceed that limit. The Legislature had never previously enacted any prohibition in respect of this; for down to that time no such extreme exercise of the power of disposition had ever arisen as in the instance which gave rise to that Act. A certain Mr. Thellusson, however, who lived in the reign of George III., and was the possessor of a very ample fortune (his real estate was of the nominal value of £5,000, and the residue of his personal estate above £600,000), conceived the whimsical idea of swelling this in the possession of his posterity to an almost fabulous amount, by direction for the accumulation of the entire income throughout the whole period within which the law recognised the principle of inalienability. His will directed the accumulation of the income of the whole of his vast property during the lives of all his children, grandchildren, and great grandchildren, who

(*d*) *Hale* v. *Hale*, L. R. 3 Ch. D. 643, M.R.; and see *Pearks* v. *Moseley*, L. R. 5 App. Cas. 714.

(*e*) 39 & 40 Geo. III. c. 98.

Chap. III.

might be living at the time of his death, and for the benefit of some future descendants to be living at the death of the survivor of the whole, and between whom the capital of his fortune was then to be divided; when it was calculated it would amount to many millions. According to the lowest computation, supposing the survivor of the persons during whose lives the accumulation was to continue should live seventy years, the property at the end of that period, if improved at compound interest at the rate of five per cent., would have amounted to about nineteen millions sterling (*f*). This extraordinary bequest became the subject of litigation; but it was established to fall within the limits sanctioned by the existing state of the law. To prevent the repetition of such a mischievous disposition in future, the Act in question, the 39 & 40 George III. c. 98, was passed; and it applies to the disposition of personal as well as of real estates. It enacts that no person by deed, will, &c., shall settle or dispose of any real or personal property, so that the rents or produce shall be wholly or partially accumulated for any longer term than (1) the life or lives of any such grantor or grantors, settlor or settlors; or (2) the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or (3) during the minority or respective minorities of any person or persons who shall be living or *in ventre sa mère* at the time of the death of such grantor, devisor, or testator; or (4) during the minority or respective minorities only of any person or persons, who under the deed, will, &c., directing such accumulations would for the time being, if of full age, be entitled to the rents and profits. This does not allow an accumulation during the minority of an unborn child (*g*). In every case where any accumulation shall be directed otherwise than allowed by the Act, such direction shall be null and void; and the rents and profits, so long as they shall be directed to be accumulated contrary to the provisions of the Act, go to such person or persons as would have been entitled thereto if such accumulation had not been directed. This does not mean that it will go to the person entitled after the accumulation, unless otherwise entitled. Thus (*h*), where a man devised

(*f*) *Thellusson* v. *Woodford*, 4 Vesey, 237.

(*g*) Lord Langdale, in seeking to construe this clause, alludes to the difficulty of attributing a distinct and efficient meaning to all the words of this Act; *Ellis* v. *Maxwell*, 3 Beavan, 596.

(*h*) *Weatherall* v. *Thornburgh*, L. R. 8 Ch. D. 261.

an estate to trustees in trust for his wife for life, or until second marriage; and in case of second marriage directed the income to be accumulated during the remainder of her life, and then gave the remainder with accumulations after her death to a stranger; the widow, having married again, and lived more than twenty-one years from the testator's death, it was held there was an intestacy as to accumulations during the period between twenty-one years from the testator's death and the death of his widow; and that the person standing in place of heir took for the rest of the life of the testator's wife.

The Act authorizes accumulation during any of the four periods, and only for one of those periods; and therefore a direction in a will to accumulate the income of trust funds for twenty-one years after the testator's death, and at the expiration of that term during the minorities of the persons entitled under the trusts, was held to be good only for twenty-one years (*i*). The Act, however, does not apply to any provision for payment of debts, or for raising portions for children, or touching the produce of timber. If, however, the allowed term is exceeded (provided the case does not fall within the rule against perpetuities) the direction for accumulation is good *pro tanto* (*k*). As observed by Lord Brougham in 1855 (*l*):—

"The Act" (which was drawn by Lord Loughborough) "had hardly ever been discussed in Courts either of law or equity, without the Judge having occasion to observe upon the inartificial, and in several respects ill-defined language in which its provisions are expressed" (*m*).

Aliens.

Prohibitions against alienation in mortmain, alienation in perpetuity, and immoderate accumulation, may be regarded as emanating from an internal and domestic policy. There was, however, prior to the Naturalisation Act, 1870 (*n*), a restriction on alienation, which arose from a foreign policy, to which it will be proper to advert; and that is the prohibition which restrained any alienation in favour of one not owing allegiance to the Crown,—that is, to a foreigner, or, as he is technically termed,

(*i*) *Wilson* v. *Wilson*, 1 Sim. N. S. 288; the Act is given *verbatim* at p. 295.

(*k*) The Act has given rise to numerous questions in respect of which reference may be made to Hayes and Jarman on Wills, 8th ed. pp. 359—363, and the notes to the leading case of *Griffiths* v. *Vere* (reported 9 Ves. 127) in Tudor's Leading Cases on Real Property, p. 497.

(*l*) *Shaw* v. *Rhodes*, 1 M. & Cr. 141.

(*m*) A contrast to Mr. Brodie's draft, 3 & 4 Wm. IV. c. 74 (Act for Abolition of Fines and Recoveries): Wms. 48.

(*n*) 33 Vict. c. 14, amended by 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.

Chap. III.

an 'alien,'—restrained it at least practically, if not theoretically; since, though it did not prevent an alien from taking, in other words acquiring an estate, it declared him incapable of holding for his own benefit, and pronounced the estate forfeit to the Crown on the institution by the Crown of the requisite proceedings to avail itself of the forfeiture.

"If," says Lord Coke (*o*), "an alien purchase lands, he is of capacity to take a fee simple, that is, to become a purchaser, but not to hold."

These proceedings were a writ of inquisition or inquiry for the ascertainment of the facts of the conveyance, and of the alienage, and on the return of the inquisitors finding them, technically termed 'office being found,' the Crown was entitled to seize. In the meantime, however, until office found, a *primâ facie* title vested in the alien. He might even, in the event of his ouster, maintain an action of ejectment on his seisin, and might himself make a conveyance over to another, subject only to the rights of the Crown when set up, and to a defeasance under them.

The restriction, however, it will be observed, applied only to alienations in fee simple, or, at all events, those conferring a freehold interest. A lease taken by a subject of a friendly state for a term not exceeding twenty-one years, and taken for the residence or occupation of himself or his servants, or for the purpose of any trade, business, or manufacture, was privileged, and not liable to forfeiture (*q*).

But now it is enacted by the Naturalisation Act, 1870, that—

S. 2. "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject" (*r*).

Debts.
In debtor's lifetime.

An estate in fee simple is so far available to the satisfaction of the debts of its owner, that, during the lifetime of the debtor,

(*o*) Co. Litt. 2*b*, ed. by Thomas, vol. i. 91. Quoted Petersdorff's Abridgment, "Alien," (A).

(*q*) Petersdorff's Abridgment, "Alien."

(*r*) 33 Vict. c. 14. The same Act deprived an alien of the right to be tried by a jury *de medietate linguæ*, but made him liable in the same manner as a natural-born subject; and enabled British subjects, where in a foreign State, and not under disability, voluntarily become naturalised in such State, to remove their allegiance, that is to cease to be British subjects and become aliens.

the estate may be taken in execution under any judgment of the Supreme Court obtained against him or in satisfaction of any decree, order, or rule of the Court (*s*); and in the event of his bankruptcy it passes to his trustee for the benefit of his creditors (*t*). Formerly the liability to execution was confined to judgments, or in other words, the decrees of the superior Courts of Common Law as distinguished from the Courts of Equity, and this was created under an old statute of the reign of Edward I. (*u*), which conferred a right of seizure to the extent of a moiety, but a moiety only, of the lands, under a writ called an *elegit* (*x*); but a statute of the present reign (*xx*) has extended this to the other cases enumerated above and to the whole of the lands.

By the construction of the statute of Ed. I., and by subsequent legislation, judgments became charges on the land, and judgment creditors had the right to follow the lands of their debtors in the hands of purchasers. This right was made subject to certain provisions as to registration of the judgments; and now by 27 & 28 Vict. c. 112, in order to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates, it has been enacted that no judgment, statute, or recognisance (*y*), to be entered up after the passing of the Act (*z*), shall affect any land until it shall have been actually delivered in execution by virtue of a writ or other lawful authority (*a*). And every writ or other process of execution by virtue whereof any land shall have been actually delivered in execution is to be registered in the name of the debtor (*b*). By the Judgment Extension Act, 1868 (*c*), judgments obtained in the Courts at Westminster and in certain Courts in Ireland and Scotland have been made respectively effectual in any other part of the United Kingdom (*d*). Lands in the county palatine of Lancaster may

(*s*) 1 & 2 Vict. c. 110, ss. 13 and 18; and Rules of the Supreme Court, Ord. XLII.

(*t*) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15.

(*u*) 13 Ed. I. c. 18 = Westminster the Second. See *ante*, p. 65.

(*x*) So called because it was stated in the writ that the creditor had elected to pursue the remedy provided by the statute.

(*xx*) 1 & 2 Vict. c. 110. And see 2 Vict. c. 11.

(*y*) *i.e.*, statute merchant and statute staple, which with recognisances are now obsolete. See account of them in 2 Bl. 161; and *post*, p. 199.

(*z*) July 29, 1864.

(*a*) S. 1. As to what is 'actual delivery,' see *ante*, p. 77.

(*b*) S. 3.

(*c*) 31 & 32 Vict. c. 54.

(*d*) For the history of the law on this subject reference may be made to Wms. on R. 84 *et seq.*; or to 1 Prid. 143 *et seq.*, where he treats of the searches which

Chap. III.

also be affected by the decrees, &c., of the Court of Chancery of the county palatine of Lancaster, the only palatine Court to which jurisdiction now remains since the coming into operation of the Supreme Court of Judicature Acts, on 1st November, 1875 (*e*). For any judgment, decree, or rules, either of the superior Courts or of the palatine Courts to affect lands in the palatine counties, registration was necessary in the court of the county palatine in which the lands were situate (*f*). As s. 2 of 27 & 28 Vict. c. 112, above referred to, makes the term 'judgment' in the first section include "registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment," it follows that in order that lands may be affected by the decrees of the Chancery Court of Lancaster, the land must have been actually delivered in execution, and the writ or other process in virtue whereof they have been delivered must be registered.

For judgments, rules, or orders of inferior Courts to affect lands, it is necessary that the judgment, &c., should be removed into the superior Courts (*g*); and, of course, to have the same force and effect, the same proceedings must be had thereon as in the case of a judgment of the superior Court.

As regards lands in the 'register (*g*) counties,' *i.e.*, in Middlesex (except the City of London), and the North, East, and West Ridings of Yorkshire, and the town and county of Kingston-upon-Hull, for which local registries, under statutes in the reigns of Anne and Geo. II., have been established, in order for a 'judgment' to affect those lands as against a *bonâ fide* purchaser, it is necessary that a memorial of the registration of execution be entered in the local registry (*h*). Land registered under the Land Transfer Act, 1875 (*i*), if situate within the jurisdiction of the local registries, is exempted from such jurisdiction.

Debts of record, &c.

Debts of record (that is, where they arise not only by deed or simple contract, but by matter of record) (*k*) due to the Crown,

should be made by a purchaser of land on investigating the title. See, also, Dart's V. & P. ch. xi. s. 2, and that author's remarks on the present state of the law.

(*e*) See 36 & 37 Vict. c. 66, s. 16, and note by Mr. Wilson.

(*f*) 1 & 2 Vict. c. 110, s. 22, and 18 & 19 Vict. c. 15, s. 2.

(*g*) See 1 & 2 Vict. c. 110, s. 22, and 18 & 19 Vict. c. 15, s. 7; and as to County Courts, where the judgment is for an amount exceeding £20, 19 & 20 Vict. c. 108, s. 49. The prior Acts did not apply to County Courts; see *Moreton* v. *Holt*, 24 L. J. Ex. 169.

(*h*) 27 & 28 Vict. c. 112, s. 3; *Westbrooke* v. *Blythe*, 3 El. & Bl. 737; *ante*, p. 86.

(*i*) 38 & 39 Vict. c. 87, s. 127.

(*k*) So called because the judgment and all the proceedings previous thereto are

and all obligations made to the Crown (*l*), and the holding of certain offices under the Crown as treasurers or accountants (*m*), bound the party's lands in the two first cases from the time when the debt became one of record and from the time when the bond or obligation was executed respectively, and in the last case from the time of entering upon the office (*n*). In the present reign statutes have been passed providing for the registration and re-registration of such debts due or to become due; but now it is provided by the Crown Suits Act, 1865 (*o*), that no judgment, decree, or order obtained after 1st November, 1865, by or on behalf of the Crown, or recognisance entered into after that date on the proper account of the Crown, or inquisition finding after that date a debt due to the Crown, or obligation specially made after that date to the Crown, or acceptance of office after that date from or under the Crown, shall affect any land as to a *bonâ fide* purchaser for valuable consideration or a mortgagee (with or without notice), unless a writ or other process of execution has been issued and registered before the execution of the conveyance and the payment of the money. And the writ or other process of execution is to be registered in the name of the person against whom it is issued (*oo*).

Lis pendens.

It has long been the doctrine of the Courts, both at equity and at common law (*p*), that, during the pendency of a suit respecting them, any alienation of the lands must be subject to the decision in the suit; in other words, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. This is called the doctrine of *lis pendens*.

"It is not founded," said Turner, L.J., "upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is a doctrine common to the Courts, both of law and of equity, and rests upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judg-

carefully registered and preserved under the name of records in public repositories set apart for that purpose. (1 Bl. 69.)

(*l*) 33 Hen. VIII. c. 39.

(*m*) 13 Eliz. c. 4.

(*n*) 4 St. Bl. (4th ed.), 63 *et seq.*

(*o*) 28 & 29 Vict. c. 104, s. 48. See *ante*, p. 77.

(*oo*) S. 49.

(*p*) *Bellamy* v. *Sabine*, 1 De G. & J. 580, 584.

Chap. III.

ment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

To constitute *litis pendentia*, there must be *litis contestatio*; therefore, if the suit be ended by decree or otherwise, there is no *lis pendens* to affect the lands (*q*). In an Act, however, for the protection of purchasers (*r*), provision was made for the registration and re-registration of the cause, and until and unless it is made, no purchaser or mortgagee is to be bound by *lis pendens* without express notice. There is to be registered a memorandum containing the name and abode, title, trade or profession, of the person whose estate is intended to be affected, and the Court of Equity, and the title of the cause or information, &c. And as a registered *lis pendens* could not be vacated without the consent of the person by whom it was registered, and such consent was sometimes withheld although the suit or proceeding was at an end, or was not being *bonâ fide* prosecuted, it was enacted by 30 & 31 Vict. c. 47, s. 2, that the Court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order for vacating the registration without the consent of the party who registered it.

Searches by purchaser.

Judgments for ordinary debts and for Crown debts, or rather executions, and *lis pendens*, if duly registered, then, affecting lands, before every purchase it is necessary to search in the Central Office of the Supreme Court of Judicature, where the register in each case is kept (*rr*); and, in the instances above pointed out, in the Palatine Court of Lancaster or the local registries. In addition to these searches, search should be made, where the purchase is of a large estate or of agricultural lands of a moderate acreage, for charges on the land under the Drainage and other Improvements to Land Acts noticed in the Chapter on Estates for Life (*s*).

Provision has now been made by the Conveyancing Act, 1882 (*t*), for the grant of an official certificate of the result of a search in the Central Office, which certificate is to be conclusive in favor of a purchaser.

(*q*) *Kinsman* v. *Kinsman*, 1 R. & M. 622, *per* Lord Lyndhurst, L.C.

(*r*) 2 Vict. c. 11, s. 7.

(*rr*) Rules of Supreme Court Ord. LX*a*.

(*s*) See *ante*, p. 55.

(*t*) 45 & 46 Vict. c. 39, s. 2.

Voluntary settlements. 13 Eliz. c. 5. 27 Eliz. c. 4.

So completely is the principle of liability of a debtor's property to his debts recognised by the law of England, that a statute of the reign of Elizabeth (*u*) avoids as against creditors all alienations or conveyances of lands (or goods) made with intent to delay, hinder, or defraud them; but the Act does not extend to any estate or interest, on good consideration and *bonâ fide*, lawfully conveyed to any person, not having notice of such covin (*x*). Further, in respect of lands, a statute of the same reign (*y*) made conveyances, charges, leases, &c., of lands, made with intent to defraud and deceive purchasers, and all conveyances with a clause of revocation at the grantor's pleasure, void against such purchasers. An ordinary marriage settlement, made prior to marriage, or after marriage in pursuance of articles, is not within these statutes (*z*). Many questions have arisen under these statutes, in respect of which reference may be made to *Twyne's Case* (*a*). In that case, which arose under the earlier statute, it was held that the conveyance of goods was not *bonâ fide*, though for good consideration, the debtor having been allowed to remain in possession. The question of *bona fides*, where there has been no change of possession, has now come to be regarded as a question of fact in each case (*aa*). It may be added, that it has been held that a conveyance is not fraudulent and void, either under the statute or at common law, merely because it is intended to defeat the expected execution of a particular creditor, provided that it was for valuable consideration and *bonâ fide*—*i.e.*, that it was the intention of both parties to buy and sell in reality (*b*).

Both statutes, it will be observed, in terms refer to a conveyance of the property with intent to defraud. Under the earlier statute (*c*), it has been decided that the mere fact of a settlement being voluntary is not enough to render it void against creditors; but there must, for instance, be unpaid debts which were existing at the time of making the settlement, and the settlor must have been at the time, not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the

(*u*) 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5.

(*x*) This statute and the next are given in the notes to *Twyne's Case*, 1 Smith's L. Ca. 12.

(*y*) 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18.

(*z*) See 2 Prid. 181, and Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, &c.

(*a*) 1 Smith's L. Ca. 1.

(*aa*) 1 Smith's L. Ca. 13.

(*b*) *Wood* v. *Dixie*, 7 Q. B. 892.

(*c*) 13 Eliz. c. 5.

Chap. III.

creditors (*d*). As to the later statute (*e*), Cockburn, C.J. (*f*), said:—

"If its construction had been *res integra*, there has been no judge who, in modern times, has had to apply the statute, who would not probably have excluded from its operation family settlements made honestly and without any intention of defrauding creditors or future purchasers. The statute has seldom come under review without eliciting judicial observation on the forced and harsh construction put upon it by its first expounders; but its operation in avoiding in favor of purchasers for value, whether with or without notice, conveyances in favor of relations, however honest and otherwise praiseworthy, if made without valuable consideration, is now too firmly established to admit of being questioned; and it must now be taken as definitely settled that a provision even for a man's wife and children, however sacred in a moral point of view the duty of making such provision may be, is bad against a future purchaser, as being without consideration and voluntary."

But for a subsequent purchase to prevail against a voluntary conveyance, the vendor and the person who made the voluntary conveyance must be the same person. Therefore, a purchaser from the devisee of one who had made a voluntary conveyance in his lifetime, is not entitled, under 27 Eliz. c. 4, to 'avoid' that voluntary conveyance (*g*). Lord Campbell, C.J., said:—

"The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed at the time when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them (*h*). Where the same person executes the voluntary conveyance, and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance, it is quite otherwise; for the acts of one man cannot show the mind and intention of another."

On the same principle, a purchase from one to whom a voluntary conveyance has been made, cannot be disturbed by a subse-

(*d*) See *Holmes* v. *Penney*, 3 K. & J. 90, as to then creditors; and see *Jenkyn* v. *Vaughan*, 3 Dr. 419, as to subsequent creditors; and see recent instance, *In re Pearson*, 3 L. R. Ch. D. 807, where there were no unpaid debts or insolvent circumstances, but the object was plainly to defeat future creditors.

(*e*) 27 Eliz. c. 4.

(*f*) In *Clarke* v. *Wright*, 6 H. & N. 870.

(*g*) *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723.

(*h*) *Doe* d. *Otley* v. *Manning*, 9 East, 59.

quent conveyance from the original settlor (*i*). "It follows, therefore," says Mr. Prideaux (*ii*), "that after the execution of a voluntary conveyance, a person could not be advised to purchase and take a conveyance of the property from the settlor, as there may have been in the meantime a sale by the person taking under the voluntary deed."

A consideration, however small, will take the case out of the statute (*l*). As said by James, L.J. (*m*):

"If there is any valuable consideration for a settlement, the *quantum* of such a consideration is of no consequence."

In that case the settlement was an assignment by a father, on his second marriage, of leaseholds to trustees in trust for himself for life, and after his death for his son, who was one of the trustees. The trustees coming under a responsibility for payment of rent and performance of the covenants of the lease, there was a valuable consideration sufficient to support the settlement against a subsequent purchaser (*n*).

Bankruptcy Act and voluntary settlements.

The rule avoiding voluntary settlements as against creditors has been extended to the case of traders by the Bankruptcy Act, 1869 (*o*). It is thereby enacted that any settlement (that is, any conveyance or transfer) of property made by a trader, not (1) being a settlement made before and in consideration of marriage; (2) or made in favor of a purchaser or incumbrancer, in good faith and for valuable consideration; (3), or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife; shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee in b?

(*i*) *George* v. *Milbank*, 9 Ves. 190.

(*ii*) Vol. ii. p. 207.

(*l*) 27 Eliz. c. 4.

(*m*) *Price* v. *Jenkins*, L. R. 5 Ch. D. 621. This case does not apply to 13 Eliz. c. 5: see *per* Jessel, M.R., *In re Ridler*, L. R. 22 Ch. D. 81.

(*n*) And see *In re Foster* v. *Lister*, L. R. 6 Ch. D. 87, and *Teasdale* v. *Braithwaite*, 5 Ch. D. 630, where post-nuptial settlements of lands belonging to a wife were held to be for valuable consideration.

(*o*) 32 & 33 Vict. c. 71, s. 91.

Chap. III.

How far life estate determinable on life-tenant's bankruptcy, &c.

Apart from any statutory provision, the general policy of the law, while it allows a stranger to convey an estate for the benefit of another terminable by that person's bankruptcy, or on his aliening or charging it (*p*), as in the case of property coming from the wife on marriage, renders invalid against the trustee in bankruptcy a similar settlement of property belonging to the party himself (*q*), that is, so far as the curtailment of his life interest is concerned (*r*).

Debts after death.

After the death of the debtor, any landed property held for an estate in fee simple, of which he may die seised, is under the present state of the law, available equally with his personal estate to the satisfaction of his debts, whether of the nature of those termed 'specialty debts,' or debts 'by simple contract.' A specialty debt is one secured by a bond, or other instrument under seal, in which the debtor's heirs as well as himself are bound (that is, charged) with the payment of the debt: under the Conveyancing and Law of Property Act, 1881 (*rr*), a covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, are to operate in law to bind the heirs and real estate. A simple contract debt is any debt not ranging under the description of specialty, for instance, any ordinary current debt or liability, *e.g.*, a tradesman's bill. Even an acknowledgment in writing would not constitute a debt a specialty, unless the writing were also under seal; so that a liability contracted under a bill of exchange, notwithstanding the formality of the instrument, does not amount to more than a simple contract debt. The estate is subject after death to the liability in question, whether in the hands of a devisee under a testamentary disposition, or of the heir in default of such disposition.

There was formerly a distinction between 'specialty' and 'simple contract' creditors of deceased persons, as to priority of payment, in favour of the former; but this distinction has been removed in respect of all persons dying on or after 1st January, 1870, by 32 & 33 Vict. c. 46. This statute, however, does not affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debts (*s*). In the case of any

(*p*) *Brandon* v. *Robinson*, 18 Ves. 429; see form, 3 Da. ii. 798; 2 Prid. 473.

(*q*) 2 Prid. 195; and 3 Da. i. 134 *et seq.* This does not prevent a person settling his own property so as to take an interest defeasible on alienation.

(*r*) *Higinbotham* v. *Holme*, 19 Ves. 87; or in the case of a voluntary settlement, fraudulent within the Statute of Elizabeth (13 Eliz. c. 5), invalid *in toto:* see recent case, *In re Pearson*, 3 L. R. Ch. D. 807.

(*rr*) 44 & 45 Vict. c. 51, s. 59.

(*s*) It does apply to rent: *Skirraff* v.

person dying insolvent, it is now provided by the Judicature Act, 1875 (*t*), that the same rules shall prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt. That is to say, under the Bankruptcy Act, 1869 (*u*), a creditor holding a specific security on the property of the bankrupt may (1) simply have recourse to his security; or (2), he may give it up and prove for his whole debt; or (3), he may realise the security, or give credit for the estimated value, and prove in respect of the balance due to him. The old rule in equity, as established in *Mason* v. *Bogg* (*x*), was that a secured creditor might prove for his whole debt, realise his security, and receive a dividend rateably with the other creditors of the deceased on the whole debt, paying over any surplus he might receive beyond the amount of his debt.

It was not until 1833 (*z*) that the lands of all deceased persons whether they descended or were devised, were made subject to the payment of all their debts, whether by specialty, or by simple contract, and not until 1869 (*a*) that the debts were made payable equally, no matter whether they were by specialty or by simple contract. Unless there is an express or implied charge for debts on the real estate of the testator, recourse must be had to the Chancery Division of the High Court, in order to make the real estate available as assets, or, when the estate does not exceed in value £500, it may be to the County Court within the district of which the deceased person had his last place of abode, or in which the executors or administrators, or any one of them, shall have their or his place of abode (*c*); but if there is such charge the devisee or other person (*d*) may sell or mortgage for payment of debts.

To complete the subject of the liability of a man's estate to the Convicts.

Hastings, L. R. 6 Ch. D. 610. A specialty creditor has an advantage over a simple contract creditor with regard to the operation of the Statutes of Limitation: see *post*, ch. xiv. and 2 Da. ii. 21; and under 11 Geo. IV. & 1 Will. IV. c. 47, the devisee or heir may be sued personally, and judgment obtained to the extent of the assets devolved. See note by Wolstenholme and Turner to Conveyancing Act, 1881, s. 59.

(*t*) 38 & 39 Vict. c. 77, s. 10.

(*u*) 32 & 33 Vict. c. 71, s. 40.

(*x*) 2 M. & C. 443, *coram* Ld. Cottenham.

(*z*) 3 & 4 Wm. IV. c. 104.

(*a*) 32 & 33 Vict. c. 46.

(*c*) County Courts Act, 1865; 28 & 29 Vict. c. 99, s. 1, § 1, and s. 10, § 3.

(*d*) As provided by 22 & 23 Vict. c. 35, ss. 14—18. See *post*, chap. xii.

Chap. III.

payment of his debts, it should be mentioned that formerly a person convicted of treason or felony, on sentence, became attaint, and his property was forfeited to the Crown; but, as we have seen, the law, since 1870, is no longer so (*f*); the convict, however, cannot charge or alienate any property (*g*). During sentence it is placed in the hands of administrators, reverting only to the convict or his representatives on completion of sentence, pardon, or death. The administrator, however, has full power to alienate the property, or to cause payment or satisfaction of any debts or liabilities to be made out of it.

(*b.*) Power to alienate.

Hitherto we have spoken of the alienability of lands held for an estate in fee simple, we will now consider the power of certain persons possessed of lands for such an estate to alienate.

Infants.

Infants, that is, persons under twenty-one years of age, cannot make any conveyance or binding disposition of their lands; such transaction is voidable at their pleasure on attaining full age, or by their representatives after death, except that where the lands have descended, or been devised to an infant, and are required to be sold or mortgaged for payment of debts, the infant can convey under the direction of the Court for the purpose of making a title to the purchaser or mortgagee in the same way as a tenant for life can, where the lands have been devised in settlement (*h*). Also by 18 & 19 Vict. c. 43, a male infant of twenty, and a female of seventeen, can make a binding settlement on marriage, with the sanction of the Court.

No will made by any person under the age of twenty-one is valid (*i*).

Lunatics.

The conveyances of idiots and lunatics (except during lucid intervals) are absolutely void; and they are, of course, incapable of disposing by will (*ii*). Statutes, however, have been passed (*k*) empowering the Lord Chancellor, or the committees of idiots and lunatics (*i.e.*, those to whom their charge has been committed) to execute instruments in their behalf, where loss or disadvantage would otherwise be sustained by their incapacity to execute for themselves.

(*f*) 33 & 34 Vict. c. 23; *ante*, p. 23.

(*g*) S. 8. This does not mean that he may not pay his debts: see *Ex parte Graves*, L. R. 19 Ch. D. 1.

(*h*) 11 Geo. IV. & 1 Wm. IV. c. 47, s. 11; *ib.* c. 65, ss. 12, 16 and 31; 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87. See *ante*, p. 60.

(*i*) Wills Act (1 Vict. c. 26), s. 7.

(*ii*) As to the tests of mental capacity and generally, see *Smith* v. *Tebbitt*, L. R. 1 Pro. & Div. 398.

(*k*) 16 & 17 Vict. c. 70; 18 & 19 Vict. c. 13; 25 & 26 Vict. c. 86; and 45 & 46 Vict. c. 82.

Trustee Acts.

Under the Trustee Act, 1850 (*l*), and the Trustee Act Extension Act, 1852 (*m*), the Chancery Division of the High Court (*n*), in the case of infants, and the Lord Chancellor, who is entrusted by the Queen's sign manual with the care of the persons and estates of lunatics, and now such of the judges of the Supreme Court who are similarly entrusted (*nn*) in the case of lunatics, may simply by order, where an infant or lunatic is possessed of any lands upon trust, or by way of mortgage, vest them in such person and for such estate as the Court or the Chancellor, &c., as the case may be, shall direct.

Conveyancing Act, 1881.

Under the Conveyancing and Law of Property Act, 1881, the High Court has power to sell the fee simple estate of an infant, which has come to him by descent, or by devise. It is enacted that the land shall be deemed to be a settled estate within the Settled Estates Act, 1877 (*o*). Previously the Court could not sell such estate merely for the infant's benefit; it could only sell such lands as came within the definition 'settled estates,' under the Act of 1877. By virtue of the same enactment (*p*) the same powers of leasing are given to the Court and to the infant's guardians as are conferred by the Settled Estates Act, 1877, in respect of settled estates. The power of leasing infants' fee simple estates was previously under 11 Geo. IV. & 1 Wm. IV. c. 65 (*q*).

Settled Land Act, 1882.

And now, as previously pointed out (*r*), under the Settled Land Act, 1882 (*s*), special provision is made that where an infant is absolutely entitled in possession to land, he is to be deemed a tenant for life within the meaning of the Act; and, whether thus or otherwise tenant for life under the Act, the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement or under the direction of the Court.

Also where a person having the powers of a tenant for life under the Act is a lunatic, so found by inquisition, the committee of his estate may, under an order of the Lord Chancellor, or other person so entrusted by virtue of the Queen's sign manual

---

(*l*) 13 & 14 Vict. c. 60, ss. 3, 4 and 78.

(*m*) 15 & 16 Vict. c. 55.

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3).

(*nn*) Jud. Act, 1875 (38 & 39 Vict. c. 77), s. 7.

(*o*) 44 & 45 Vict. c. 41, s. 41, and see ss. 42 & 43 as to management of the land during infancy and receipt and application of income.

(*p*) 44 & 45 Vict. c. 41, s. 41.

(*q*) See *In re Letchford*, L. R. 2 Ch. D. 719.

(*r*) *Ante*, chap. i. p. 59.

(*s*) 45 & 46 Vict. c. 38, ss. 59, 60.

Chap. III.

with care of the persons and estates of lunatics, exercise the powers of tenant for life under the Act (*t*).

Married women.

Married women also are said to be "under a limited incapacity to alienate" (*u*). To understand this, it is necessary to explain the different estates which a married woman may have in lands held in fee simple:—(1) She may be possessed of a legal estate in them, as where they have been conveyed or devised to her in fee; (2) or she may have an ordinary equitable estate, as when they have been conveyed or devised to trustees in fee in trust for her in fee; (3) or she may have that peculiar equitable estate called a 'separate estate,' as when the lands have been conveyed or devised to trustees in fee, or to herself direct in fee (in which case the Court has hitherto constituted her husband a trustee), for her sole and separate use. Lands of which she is possessed for a legal estate or an ordinary equitable estate (in which case equity follows the law), she cannot alienate *inter vivos* during coverture, except with the concurrence of her husband, signified by his joining in the conveyance (*x*), and that by deed duly acknowledged before a judge of the superior courts, or of a County Court, or (before 1883) two commissioners, or (after 1882) one commissioner, after separate examination as to her knowledge of what she is doing and her wish (*xx*).

Conveyancing Act, 1882.

It was held that the Abolition of Fines and Recoveries Act (*y*) required that a certificate of the acknowledgment should be filed of record before any use could be made of the document; that the meaning of the Act was that the certificate, when filed, should have relation back to the date of the acknowledgment, when it should itself take effect; but that if the certificate be not filed, then the acknowledgment should not have any effect whatever (*z*). It has, however, been enacted by the Conveyancing Act, 1882 (*zz*), that as regards deeds executed by married women after 1882, where the memorandum of acknowledgment purports to be signed by a person authorised to take the acknowledgment, the deed shall, as regards the execution by the married woman, take effect at the

(*t*) S. 62. As to the further application of this section, *e.g.* to a tenant in tail or to a married woman, see note by Wolstenholme & Turner.

(*u*) Wms. 68.

(*x*) See examples, 2 Da. i. 249.

(*xx*) Abolition of Fines and Recoveries Act, 3 & 4 Wm. IV. c. 74, ss. 77, 79, 80; County Courts Acts Amendment Act, 1856 (19 & 20 Vict. c. 108), s. 73; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7.

(*y*) 3 & 4 Wm. IV. c. 74, s. 86.

(*z*) *Jolly* v. *Handcock*, 7 Ex. 820.

(*zz*) 45 & 46 Vict. c. 39, s. 7.

time of the acknowledgment, and shall be conclusively taken to be duly acknowledged. But a certificate may still be filed in the Supreme Court, and an office copy is to be received as evidence of the acknowledgment. Formerly, any alienation by her must have been by fine duly levied in the Court of Common Pleas, she being examined apart from her husband, to ascertain whether she joined in the fine of her own free will.

Legal estate—equitable estate.

At law, by the act of marriage, the husband acquires a freehold interest during the joint lives of himself and his wife in land, its rents and profits, belonging to her in fee simple, and such interest passes by the deed of the husband alone (*a*); and the wife is under an absolute incapacity during coverture to dispose of such lands by will. By the 14th section of the Statute of Wills (*b*), it was enacted that wills or testaments, made of any manor, lands, tenements, or other hereditaments, by any woman covert should not be taken to be good or effectual in law; and the Wills Act (*c*) made no difference in this respect (*d*). But over lands which are her separate estate she has the same power of disposition by deed or will as if she were a *feme sole*, so far as relates to the equitable or beneficial interest therein. Lord Westbury, L.C., said :—

"When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognised and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use, to require consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of; that would be to make her subject to his control and interference. The whole lies between a married woman and her trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert*'s equitable interest; when the trust thus created

(*a*) *Robertson* v. *Norris*, 11 Q. B. 916.
(*b*) 34 & 35 Hen. VIII. c. 5.
(*c*) 1 Vict. c. 26.
(*d*) S. 8.

Chap. III.

is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity" (*f*).

In that case the legal estate was in a trustee, and the remarks of Lord Westbury applied only to the wife's power over the equitable estate. The legal estate, if vested in the wife, was considered to remain subject to the ordinary legal incidents, and therefore the husband and wife must both be conveying parties, and the deed must be acknowledged by her to pass the legal estate, unless it be vested in the wife to such uses as she shall appoint, in which case, by a conveyance operating as an appointment of the use, she can convey alone by deed unacknowledged (*g*).

What is said as to legal and equitable estates will be clearer after we have dealt generally with such estates, and the distinction between them, and with uses and trusts (*h*).

Married Women's Property Act, 1882.

Now, however, it is provided by the Married Women's Property Act, 1882 (*i*), that a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing by will, or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. And (*k*) that every woman married after 1882 shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at marriage, or shall be acquired by or devolve upon her after marriage. Also (*l*), that every woman married before 1st January, 1883, shall be entitled to have and to hold, and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after 1882. But these provisions are not to interfere with or affect existing settlements, and the power to make future settlements (*m*). The above Act was passed to consolidate and amend the previous Acts relating to the property of married women—namely, the Married Women's Property Act, 1870, and the Amendment Act, 1874 (*n*). By the Act of 1870, it had been enacted (*o*), that where any freehold,

(*f*) *Taylor* v. *Meads*, 13 W. R. 394, and 34 L. J. Ch. 203.
(*g*) 1 Prid. 184. See 2da. 1.24.2 note
(*h*) Chap. ix., *post*.
(*i*) 45 & 46 Vict. c. 75, s. 1.
(*k*) S. 2.
(*l*) S. 5.
(*m*) S. 19.
(*n*) 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50.
(*o*) 33 & 34 Vict. c. 93, s. 8.

for unacknowledged deed is with powers only in equitable title, her husband & her are legally trustees of the legal title for the alienee or devisee.

copyhold, or customaryhold property should descend upon any woman married after 9th August, 1870, as heiress, or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to her for her separate use. The better opinion was, that that Act (unlike the Act of 1882) did not affect the fee simple, and therefore that she had no power to dispose of it during coverture by will, or otherwise than by an acknowledged deed (*p*).

In a case arising under the Married Women's Property Act, 1870 (*q*), James, L.J., thus referred to the state of the law prior thereto :—

> "In former years, and down to times within my recollection, judges of what used to be the Common Law Courts of this realm delighted in applying rigidly and strictly a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst those maxims was one by which a married woman was held incapable of taking a gift, either from her husband or from a stranger,—holding that in the one case it remained, and in the other became, the husband's property. But the Court of Chancery (a very great Court in its day, although it has now ceased to exist) invented that blessed word and thing, 'the separate use of a married woman,' and as that Court never allowed itself to be impeded or obstructed by mere technicalities, it provided that whenever it was necessary, and so far as it was necessary to give effect to that separate use of a married woman, the husband should be made a trustee of whatever property came to him in his marital right which ought to be so held."

By the Married Women's Property Act, 1882 (*r*), provision is made more fully than in the Act of 1870 (*s*), for any question between husband and wife as to the title to or possession of property being decided by application in a summary way to a judge of the High Court, or, at the option of the applicant, to the judge of the County Court of the district in which either party resides. Also, it is provided (*t*), that every married woman shall have in her own name against all persons, including her husband, the same civil remedies, and also (with some restriction as regards her husband) the same remedies and redress, by way of criminal

---

(*p*) 2 Da. i. 268, note: *contra*, 1 Prid. 173.

(*q*) *Ashworth* v. *Outram*, L. R. 5 Ch. D. 941.

(*r*) 45 & 46 Vict. c. 75, s. 17.

(*s*) 33 & 34 Vict. c. 93, s. 9.

(*t*) 45 & 46 Vict. c. 75, s. 12.

Chap. III.

proceedings, for the protection and security of her own separate property as if it belonged to her as a *feme sole*.

Restraint on anticipation

In order to protect the wife against the influence and persuasion of her husband to exercise her unfettered power of disposition over her separate estate in his favour, and otherwise to preserve the benefit to her, in the instrument of gift to the wife a clause is often introduced restraining during coverture her power of alienation, or anticipation of the income. This was first done by Lord Thurlow at the end of the last century, upon the theory that equity, making her the owner and enabling her as a married woman to alien, might limit her power (*x*); and since that time it has been usual to introduce into wills and settlements a clause giving to women (*y*) real and personal estate for their separate use independently of their husbands, without power of assignment, by way of anticipation or of alienation (*z*). This, however, while restraining her acts *inter vivos*, does not interfere with her free power of disposition by will (*a*). It is provided by the Married Women's Property Act, 1882 (*b*), that no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage (*bb*). The restriction does not extend to prevent a married woman, equitable tenant in tail under a will to her separate use of freehold lands, without power of alienation or anticipation, from barring the entail with the concurrence of her husband, and limiting the property in fee to her separate use (*c*). It was argued that the restraint attached to the whole estate of the woman, but it was decided that there was no restraint except

(*x*) *Brandon* v. *Robinson*, 18 Ves. 434, and *Tullett* v. *Armstrong*, 1 Bea. 22, *per* Lord Langdale, M.R.; on appeal, Lord Cottenham, L.C., 4 M. & Cr. 377.

(*y*) Whether at the time married or not, for though gifts to separate use and the restraint on alienation, &c., would have no effect before or after coverture, yet they would come into operation upon marriage, and exist during the coverture (*Tullett* v. *Armstrong*, 1 Beav. 1; and see *Hawkes* v. *Hubback*, L. R. 11 Eq. 5).

(*z*) Lord Langdale, 1 Beav. 23.

(*a*) *Baggett* v. *Meux*, 1 Coll. p. 151; see generally on the subject of married women's separate estate, *Hulme* v. *Tenant*, 1 White & Tud.'s L. Cas. in Equity, 435; and see form, 3 Da. ii. 798, or 2 Prid. 217; and as to the words to create it, other than 'separate,' which has *per se* a technical signification, that like it they must shew the intention to secure the property against the control of the husband and to give to the wife the sole and absolute disposition, see *Massy* v. *Rowen*, L. R. 4 H. of L. 288.

(*b*) 45 & 46 Vict. c. 75, s. 19.

(*bb*) See *London & Provincial Bank* v. *Bogle*, L. R. 7 Ch. D. 773.

(*c*) *Cooper* v. *Macdonald*, L. R. 7 Ch. D. 288.

as regarded the income of her life estate. But assuming that the argument was right, and that the fetter was on the whole estate, Jessel, M.R., said:—

"What is the meaning of the fetter? The meaning is exactly that which was expressed by the old common form of conveyancers, 'so as in nowise to deprive herself of the benefit thereof by way of anticipation.' The meaning was to give the actual enjoyment to the married woman for her own benefit, not for the benefit of anybody else; and it is absurd, it appears to me, to extend such an equitable provision as this so as to prevent a married woman enlarging the estate tail into an estate in fee simple for her own benefit. That is not an alienation so as to deprive herself of anything; it is not, strictly speaking, perhaps, an alienation at all, except in a very wide sense of the term. It is, strictly speaking, what is always called an enlargement of the estate. The mode in which it is done is by a conveyance which is called an alienation, but it is really nothing more than making that estate already given to the married woman indefeasible. If that is so—and all the clauses or fetters on alienation, if applying to the estate tail, would equally apply to the pure fee simple—why should I construe that clause against anticipation, which was invented by a Lord Chancellor for the benefit of a married woman, to her damage and injury?

"It appears to me that would be a wrong construction, and altogether opposed to principle. That would amount to saying that that clause which was intended to give her the full benefit of the property is to deprive her of the right of extending that benefit in her own favor, and I entirely decline so to construe the clause against my own views, had it been even more extensive than it appears to me to be in this will."

Conveyancing Act, 1881.

Now under the Conveyancing and Law of Property Act, 1881, notwithstanding that a married woman is restrained from anticipation, the High Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent, bind her interest in any property (*d*). It has hitherto been held that the Court had no power to interfere—*e.g.*, where a testator gave a legacy to a married woman upon condition that she should give up an estate devised to her by another testator for her separate use, with a clause against anticipation—though to have done so would have been greatly to her benefit (*e*).

Settled Land Act, 1882.

It has been mentioned before (*f*) that special provision has been made by the Settled Land Act, 1882 (*g*), for the case of a married woman being tenant for life within the meaning of that Act. Having now explained the meaning of separate estate and

(*d*) 44 & 45 Vict. c. 41, s. 39 and s. 2 (xviii.); and see *Hodges* v. *Hodges*, L. R. 20 Ch. D. 749.

(*e*) *Robinson* v. *Wheelwright*, 6 De Gex M. & G. 535; and see *In re Tussaud's Estate*, L. R. 9 Ch. D. 375. *In re Wheeler*, 27 Ch. D. 666.

(*f*) *Ante*, chap. i., p. 59.

(*g*) 45 & 46 Vict. c. 38, s. 61.

Chap. III.

restraint on anticipation, the details of such provision will be more readily understood. It is provided that where a married woman, who, if not married, would have been a tenant for life or had the powers of such under the Act, is entitled for her separate use or as a *feme sole*, then she, without her husband, is to have the powers of tenant for life; and, when she is entitled otherwise, she and her husband together are to have such powers. And she may execute all deeds and instruments necessary; and a restraint on anticipation is not to prevent the exercise by her of any power.

Vendor and Purchaser Act, 1874.

By the Vendor and Purchaser Act, 1874, it was provided that where any freehold hereditament shall be vested in a married woman as a bare trustee, she may convey the same as if she were a *feme sole* (*h*).

Liability to engagements.

In equity a married woman's separate estate (that is, such separate estate not restrained against alienation as she had at the time of contracting the engagement) could be made liable to her general engagements (including tradesmen's bills, &c.), made in reference to and on the faith or credit of that estate (*i*). But not even in equity could her separate estate be made liable for general torts though in reference to trusts; thus, where a woman, the legal owner of a rent-charge in trust to apply the same for the benefit of another person, married, and applied it wrongfully to other purposes, it was ineffectually sought to charge her separate estate with the amount so misapplied (*k*).

It has, however, been enacted by the Married Women's Property Act, 1882 (*l*), that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract (which includes the acceptance of any trust, and the liability extends to any breach of trust (*m*)), and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined as a party; and any damages or costs recovered against her shall be payable out of her separate property. And further (*n*), that every contract entered into by a married woman shall be deemed to be a contract with respect to and to bind her separate property, unless the contrary be shown.

(*h*) 37 & 38 Vict. c. 78, s. 6.

(*i*) *Johnson* v. *Gallagher*, 30 L. J. Ch. 298: and *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454.

(*k*) *Wainford* v. *Heyl*, L. R. 20 Eq. 321.

(*l*) 45 & 46 Vict. c. 75, s. 1 (2).

(*m*) S. 24.

(*n*) S. 1 (3).

A creditor can obtain a judgment against the separate estate, and can then obtain payment out of it; but where he has no such judgment he cannot interfere to prevent the woman from dealing with her property (*o*). The notion at one time prevailing that the engagements of a married woman were in the nature of charges on her separate estate was erroneous (*p*). Hitherto her engagements could not be enforced against separate estate to which she became entitled subsequently to such engagements (*q*). But it is enacted by the Married Women's Property Act, 1882 (*r*), that every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

Clergy.

To complete this branch of the subject—namely, the power of certain persons to alienate—it should be added that beneficed clergymen, who, as we have seen (*rr*), Lord Coke says, have a qualified fee simple in their livings, cannot charge even against themselves the fruits of their living or any part of them (*s*). But the profits of a benefice may be applied to the satisfaction of the debt of a judgment creditor of the clergyman, by means of a sequestration—a kind of execution for debt (*t*). The statutes now regulating this are 12 & 13 Vict. c. 67, 34 & 35 Vict. c. 45.

Descent

It only remains to be added that, subject to testamentary disposition and to its liabilities to creditors, an estate in fee simple descends, upon the death of its owner, on his real representative or heir; except that, in the case of a male leaving a widow, there may intervene a right of dower in her, in other words, a right during her life to a third of the lands; and in the case of a female leaving a husband, there having been born issue inheritable to the estate, a right during his life to the entire estate, called an estate by curtesy.

Of these interests, however, we reserve the consideration to the next chapter.

(*o*) *Robinson* v. *Pickering*, L. R. 16 Ch. D. 660.

(*p*) *Owens* v. *Dickenson*, Cr. & Ph. 48.

(*q*) *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454.

(*r*) 45 & 46 Vict. c. 75, s. 1 (4), and see s. 1 (5).

(*rr*) *Ante*, p. 84.

(*s*) *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1.

(*t*) Petersdorff's Abridg. vol. vi. 366.

Chap. IV.

CHAPTER IV.

DESCENT OR DEVOLUTION OF FREEHOLDS OF INHERITANCE.

I. Descent to heirs subject to dower and curtesy.

On the death of a tenant in fee simple, should he not have disposed of his estate by will, or of a tenant in tail, the estate descends (subject to the liability to satisfy the debts of the deceased) to his heir. If, however, the deceased tenant was a male leaving a widow, there might intervene a right in her to 'dower' out of the estate; or, if a female leaving a husband, an estate in him called 'a tenancy by the curtesy of England.'

a. Dower. Assignment of.

Dower is a right in the widow to the enjoyment for her life of a portion of the estate; and to have this specifically set out by metes and bounds and assigned to her—that is, where the husband was solely 'seised,' for where he was seised in common with others she cannot be endowed by metes and bounds (*a*). In such latter case a dower shall be assigned to her in common; for the 'dowress,' as the widow is called, being in *pro tanto* of her husband's estate, cannot have it in other manner than he himself had (*b*). The third is the proportion which the common law assigns to her; but in gavelkind lands she takes a moiety. By Magna Charta, it was provided that the widow should remain in her husband's capital mansion house for forty days after his death, during which time her dower shall be assigned. These forty days were called the widow's 'quarentine' (*c*).

One-third except in gavelkind.

For life except in gavelkind.

"Dower was," says Blackstone (*d*), "formerly forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it."

In gavelkind lands, however, the right to dower is still subject to the condition of the widow remaining chaste and unmarried (*e*).

Attaches only on estates in possession.

The right to dower attaches only on an estate of which the husband was possessed, as distinguished from one to which he

(*a*) For form of decree in action for dower, see 2 Seton on Decrees, 681.

(*b*) Co. Litt. 37*b*, ed. by Thomas, vol. i. 593, note.

(*c*) 2 Bl. 135.

(*d*) *Ib.* 133. See *ante*, p. 39.

(*e*) 1 St. Bl. 265.

was entitled in remainder or reversion only (unless the reversion was expectant on a term of years) (*f*); but the husband may have had the right without the legal seisin, and the estate may have been equitable or legal (*g*). Also the estate must have been held in severalty or in common, and not in joint tenancy, for reasons which will appear when we come to deal with those modes of ownership (*h*).

Not on estates held in joint tenancy.

Its existence is conditional on the party having been the actual wife of the owner at his death, and past the age of nine years (*i*). A sentence of divorce involving a dissolution of the marriage itself, or as it is technically termed '*a vinculo matrimonii*,' would extinguish the right, though not a mere judicial separation or as it was called, divorce '*a mensâ et thoro*.' Under the common law even adultery would not destroy the right; though under the Statute of Westminster the Second (*k*), were the wife to elope from her husband—that is, leave his house and live with the adulterer—she would lose her dower, unless the husband were subsequently reconciled to her (*l*). It has recently been held that where a grant of alimony has been made upon decree for divorce, though obtained by the wife against the husband on the ground of his misconduct, the right to dower ceases; the grant of alimony is in lieu of dower (*m*).

Only to actual wife at tenant's death and past nine years.

Under a statute of the reign of Edward VI. (*n*), the widows of traitors are barred of their dower, though not those of ordinary felons. But this apparently is altered by the Act to abolish forfeitures for treason and felony (*o*); for, although no reference is made expressly to dower in the Act, the first section says, "no conviction, &c., for any treason or felony shall cause any forfeiture."

Traitors.

It is also a condition that the lands, the subject of the claim to dower, should be those of which there was a possibility to inherit on the part of any issue which the wife might have had. In the case of curtesy, we shall see there must have been such issue born. Therefore, says Blackstone (*p*):—

Possibility of issue inheritable.

(*f*) *Post*, pp. 202, 212.
(*g*) 3 & 4 Wm. IV. c. 105, ss. 2, 3.
(*h*) *Post*, chap. viii.
(*i*) Co. Litt. 33*a*, ed. by Thomas, vol. i. 569.
(*k*) 13 Ed. I. c. 34.
(*l*) 2 Bl. 130, and *Woodward* v. *Dowse*, 10 C. B. (N. S.), 722, and *Bostock* v. *Smith*, 34 Beav. 57.
(*m*) *Frampton* v. *Stephens*, W. N. (1882) 78.
(*n*) 5 & 6 Edw. VI. c. 11.
(*o*) 33 & 34 Vict. c. 23. *Ante*, p. 23.
(*p*) 2 Bl. 131.

Chap. IV.

"If a man seised in fee simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet, if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them."

And says Lord Coke (*q*):—

"Albeit the wife be a hundred years old, or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above three score years hath had a child."

Right of dower, how defeated under the Dower Act.

The right is one which may be defeated, wholly or in part, by a declaration against dower in the deed of conveyance under which the husband held, or in his will, or by disposition in his lifetime or by will. Thus, it will be defeated by a declaration in the original deed of conveyance, or in any deed executed by him, that the widow shall not be entitled to dower out of such land (*qq*); or by a declaration in the will of the deceased husband as to any land of which he shall die wholly or partially intestate, that she shall not be entitled to dower out of such, or out of any of his land (*r*); or by any absolute disposition of the whole or portion of the estate in his lifetime, or by his will, as to any land so disposed of (*rr*); and, unless a contrary intention be declared in the will, if the husband devise any land by his will to or for the benefit of his widow, out of which she would otherwise be entitled to dower, she shall not be entitled to dower out of any land of her husband (*s*); and all partial estates and interests created by any disposition in his life or by will, and his debts, prevail against the widow's right to dower (*ss*). Such is the law in respect of all cases falling within the Dower Act of 1833. That Act applies to all widows whose marriage dates ~~on or~~ subsequently to the 1st January, 1834.

(*q*) Co. Litt. 40*a*, ed. by Thomas, vol. i. 579.

(*qq*) 3 & 4 Wm. IV. c. 105, s. 6.

(*r*) *Ib.* s. 7.

(*rr*) *Ib.* s. 4.

(*s*) *Ib.* s. 9.

(*ss*) *Ib.* s. 5.

Effect of Dower Act.

"The effect of the Act," says Mr. J. Williams (*t*), "is evidently to deprive the wife of her dower, except as against her husband's heir-at-law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support, unless indeed the husband should have executed a declaration to the contrary."

And he exclaims against what after the Act became a common practice, namely, of putting a declaration against dower as a common form in purchase deeds.

How otherwise defeated. Jointure.

The wife's right to dower may be also barred by a jointure settled upon the wife before marriage in substitution for her dower; if settled after marriage, she has her election after her husband's death between jointure and dower. A jointure is defined by Sir Edward Coke (*tt*) to be "a competent livelihood of freehold for the wife of lands or tenements to take effect presently in possession or profit after the decease of her husband for the life of the wife at the least"—that is, it must not be *pur autre vie*, or for a term of years or other smaller estate; hence it is a freehold. It was called a jointure, because, before the Statute of Uses (*u*), it was usual on marriage to settle by deed some special estate to the use of the husband and wife for their lives in joint tenancy, or 'jointure'; which settlement would be a provision for the wife in case she survived her husband. Before that statute the husband had no legal seisin in such lands as were vested in another to his 'use,' and therefore the widow was not dowable out of them, for before the Dower Act dower did not attach except upon lands of which he was seised at law; but, as will presently appear, by reason of that statute he acquired such seisin, and therefore the widow would have been entitled to dower out of them, and at the same time to any special lands that might be settled in jointure, had it not been provided also by that statute that upon the husband's making such estate in jointure to the wife before marriage she should be precluded from dower; but it must be expressed to be in satisfaction of her whole dower (*x*). In addition to this legal bar of dower, there

(*t*) R. P. 235.

(*tt*) Co. Litt. 36*a*, ed. by Thomas, vol. i. p. 614.

(*u*) 27 Hen. VIII. c. x.

(*x*) 1 Bl. 137; and see 3 Da. i. 310; for form see 3 Da. ii. 985: "After the decease of A. B. (husband) To the use that if the said C. D. (wife) shall survive the said (husband) she and her assigns may thenceforth receive during her life the yearly rent-charge of £ in full for her jointure and in bar of all dower whatsoever to be charged upon the said premises hereinbefore expressed to be hereby granted and to be payable by equal half-yearly payments," &c.

Chap. IV.

Equitable bar by contract.

may be an equitable one, as when the wife has, being of full age, before marriage, agreed to take something else in lieu of dower, as a provision out of the personal estate; or it may be even a chance in satisfaction for her dower; then she will be restrained in equity from setting up a claim to dower: the question in such case will be whether it was part of her contract (*y*). A detention by the widow from the heir of the title-deeds of the estate would suspend her right (*z*).

Old law.

The Dower Act effected a considerable modification of the old law on the whole subject of dower, which still applies to all marriages previous to ~~1st~~ January, 1834.

Seisin.

Under that law the dower only attached on what is called a legal seisin on the part of the husband, as distinguished from a mere equitable interest in him. This is an exception to the general rule, that in the incidents of estates equity follows the law (*a*). Thus, suppose an estate to be vested in A., so as to carry with it a seisin of the legal ownership, but to be held by him in trust for B.; notwithstanding the beneficial interest would be in B., previously to the late Act, the widow of B. would not have been dowable. But a seisin in law was sufficient. As where lands descended to the husband, before entry he hath but a seisin in law (not in deed); and yet it was said "the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land when he is to be tenant by curtesy" (*b*).

Difficulty in way of defeating right.

Again, under the old law, an incipient right on the part of the wife to the dower attached contemporaneously with the acquisition by the husband; and could not be defeated by him except with the wife's concurrence, which at that period could only be obtained through the costly process of a fine, the wife being separately examined. This right prevailed against alienation by himself whether by sale or otherwise in his lifetime, or by his testamentary disposition, and it was paramount to the claims of the creditors by whom it could not be reached. The embarrassments to which this led, particularly in the case of a sale of the

---

(*y*) *Dyke* v. *Rendall*, 2 De G. M. & G. 218, *per* Lord St. Leonards.

(*z*) 2 Bl. 136. Several surmises as to the origin of dower are given at p. 129.

(*a*) *Per* Jessel, M.R., *Cooper* v. *Macdonald*, L. R. 7 Ch. D. 295.

(*b*) Co. Litt. 31*a*, ed. by Thomas, vol. i. p. 574.

lands being sought to be effected by the husband in his lifetime, called forth the ingenuity of conveyancers in framing forms of conveyance adapted, on the occasion of the original purchase, to exclude the right of dower. Several methods were devised (*c*), which gave way to that known as the conveyance to uses to bar dower, which will be presently explained.

Power to lease.

It remains to be added, that under the Settled Estates Act, 1877 (*d*), the tenant in dower entitled to the possession or receipt of rents and profits may lease the lands, except the principal mansion house and the demesnes thereof and other lands usually occupied therewith, for twenty-one years.

b. Curtesy.

Tenancy by the curtesy of England, commonly called 'tenancy by the curtesy,' is to the husband in the lands of his wife, very much like that in dower to the wife in the lands of her husband; except that, instead of being confined to a third of the lands, it embraces a life interest in the whole for the husband's life. If the lands, however, be gavelkind, he takes but a moiety; and that so long only as he does not marry again (*e*). After some conflicting decisions, it is now settled that where lands are settled on a wife to her separate use, the husband will take his estate by curtesy in them, if she dies without having disposed of them by will or otherwise, equity in this case following the law (*f*).

In the whole of the lands—except in gavelkind.

For life—except in gavelkind.

In wife's separate estate.

The marriage, too, must be a valid and subsisting one; so that, if either *ipso facto* void, or avoided by divorce *a vinculo matrimonii*, no estate by the curtesy can be claimed (*g*).

Valid and subsisting marriage at wife's death.

In the matter, too, of the condition of the birth of issue inheritable to the lands, whereas in the case of dower, it is sufficient that the lands be such as issue, had there been any, might have inherited; in the case of curtesy, the actual birth of issue is required, though not its subsequent survivorship. Such, at least, is the case throughout the great bulk of the kingdom; but in gavelkind lands the tenancy by the curtesy takes place whether issue were actually born or not (*h*). A notion has prevailed that the child must be heard to cry, but that is a mistake; crying, though a very unmistakable sign, is not the only evidence of

Actual birth of issue inheritable in mother's life.

Except in gavelkind.

(*c*) See Wms. 232.

(*d*) 40 & 41 Vict. c. 18, s. 46, which re-enacts with slight alterations 19 & 20 Vict. c. 120, s. 32.

(*e*) Co. Litt. 30*a* (note by Hargr.), ed. by Thomas, vol. i. p. 563.

(*f*) *Cooper* v. *Macdonald*, L. R. 7 Ch. D. 288.

(*g*) 1 St. Bl. 263.

(*h*) Co. Litt. 30*a*, ed. by Thomas, vol. i. p. 563.

Chap. IV.

life. The child, however, must be born during the life of the mother. Should she die in labor, and were the child extracted after death from the womb, by what is called the Cæsarean operation, it would not suffice. It may have been born at any time during the coverture, without reference to the actual period of seisin. The issue, moreover, must have been capable of inheriting the mother's estate. In the case, therefore, of an estate tail limited to her and the heirs male of her body, the birth of a daughter would give the husband no right (*i*).

Wife need not have been legally seised.

Differing also from dower (as the law with reference to it formerly stood), it is not necessary that the seisin of the wife should have been a legal one. An equitable seisin (that is, if the lands were vested in trustees for her and her heirs) would suffice (*k*).

Estate must have been in possession.

As in the case of dower, to give the husband his tenancy, the estate must have been not reversionary, but in possession; and in the instance of lands devolving on the wife by descent, an actual possession must have been had as distinguished from a mere right to take it (*l*).

Power to lease.

The tenant by curtesy has the same power of leasing as the tenant by dower under the Settled Estates Act, 1877 (*m*).

Powers under Settled Land Act, 1882.

The powers of a tenant for life under the Act are given to a tenant by the curtesy by the Settled Land Act, 1882 (*mm*).

No interference with power of alienation.

A tenancy by the curtesy is not frequently met with now, as the rights of husbands in the estates of their wives are generally defined by a marriage settlement. It never, like dower, added to the difficulty of alienating the lands; for the husband and wife together could always make such dispositions of the wife's lands as she could do if unmarried—formerly, by fine levied in the Court of Common Pleas, now by conveyance duly acknowledged (*n*) —separate examination being requisite under the old method as well as under the modern one. By such disposition the inchoate right of the husband to curtesy would be lost.

Origin.

As in the case of dower, so in that of curtesy, the origin of its introduction into English jurisprudence is not very clear (*o*).

II. Inheritance.

The rights in respect of dower or curtesy either not arising or

(*i*) 1 Bl. 127.

(*k*) See *per* M.R. in *Cooper* v. *Macdonald*, L. R. 7 Ch. D. 295.

(*l*) Co. Litt. 29*a*, ed. by Thomas, vol. i. p. 558. See *ante*, p. 126.

(*m*) 40 & 41 Vict. c. 18, s. 46.

(*mm*) 45 & 46 Vict. c. 38, s. 58 (1), (viii.). See *ante*, p. 56 *et seq.*

(*n*) 3 & 4 Wm. IV. c. 74, ss. 77, 79, 80; 19 & 20 Vict. c. 108, s. 73; and 45 & 46 Vict. c. 39, s. 7. *Ante*, p. 114.

(*o*) See 2 Bl. 126.

being satisfied, the estate devolves on the heir; and here, to adopt the words of Blackstone (*p*):—

Heir—what.

"It must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead, *Nemo est haeres viventis*. Before that time the person who is the next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son."

Posthumous children.

Posthumous children are enabled to take estates arising by marriage or other settlement as if born in their parent's lifetime, by 10 & 11 Wm. III. c. 16; the House of Lords had previously decided that such child would take in the case of an estate devised by will (*pp*). If a posthumous child takes by descent, he takes only from his birth; but if he takes under the statute, he takes from his parent's death.

Landed property originally partible equally.

Antecedently to the Norman Conquest, and the introduction of the feudal system, all landed property would appear to have been partible equally among those in the line of descent—that is to say, in the case of children, between all the children—that is, the male ones; and in the case of brothers, between all the brothers, and so on; save only in those particular localities where the custom of descent by borough English to the youngest son prevailed. In some particular localities, mostly in the county of Kent, the custom of equal partibility still prevails under the name of gavelkind; also in some places is preserved the custom of borough English (*q*).

And, under feudal system, went to lineal descendants

Originally it would appear the descent was confined to the offspring of the grantee of the feud. Collaterals, however, were afterwards admitted; though at what particular period is not

(*p*) Vol. ii. 208.

(*pp*) *Reeve* v. *Long*, 1 Salk. 228; and see 2 Wms. Saund. 387*a*.

(*q*) See *ante*, pp. 28, 29.

Chap. IV.

Descent of the whole land.

known. Lineal descendants, however of one who would have been heir, if living, were the first to take, they being allowed to inherit by right of representation. In default of all such descendants, brothers and sisters came in next, if they were dead, their children, by right of representation; then uncles and their children; then aunts and theirs; and, through all these stages, males were preferred to females. The father or other lineal ancestor could not succeed, nor could kindred of the half-blood.

But one heir except in case of females.

The principle of the feudal system required unity, or oneness, in the ownership, as distinguished from partibility; and we find accordingly, that, at all events by the reign of Henry III.—with the exception only of the case of a devolution on females, when all took alike—the descent was always upon the one individual who was the eldest of the branch, instead of upon all; the eldest son, for instance, to the exclusion of all the other sons, the eldest brother to the exclusion of all the other brothers.

Rules of descent, when first obtained.

The rules of descent under the feudal system, gradually fixed, had long remained unaltered. They had been the same for above 400 years, when Lord Hale reduced them to a series of canons, which were afterwards explained and illustrated by Blackstone in his Commentaries. The same rules, modified by the Inheritance Act (*s*), as to persons dying on or after the 1st January, 1834, still prescribe the course of descent. It should be added that, so far as is consistent with the peculiarities of a system of either gavelkind or borough English, the course of succession even there follows the general law; for example, the descent would go to males before females, to lineal before collateral heirs.

Rules or canons of descent.

The law of descent as now prevailing, may be reduced to the following canons or rules:—

I. From purchaser.

I. In every case descent shall be traced from the 'purchaser' (*t*), *i.e.*, the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent (*u*).

According to the old law, descent was to be traced from the person who last had the feudal possession or seisin, briefly expressed in the maxim *Seisina facit stipitem* (*x*).

(*r*) 2 Bl. 228.

(*s*) 3 & 4 Wm. IV. c. 106. Amended by 22 & 23 Vict. c. 35, ss. 19 and 20.

(*t*) 3 & 4 Wm. IV. c. 106, s. 2.

(*u*) S. 1.

(*x*) 2 Bl. 209.

Who to be considered 'purchaser.'

It being often uncertain whether a person had acquired by descent or otherwise, it is provided, "to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require," that the person last entitled to the land (that is, the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof) (*y*), shall be considered to have been the purchaser, unless it be proved that he inherited the same; and so onwards (*z*).

Devise to heir.

By the common law, where a man devised land to his heir so that he would take the same estate as by descent, the descent would take effect and not the devise; but by the Inheritance Act it is enacted that the heir shall be considered to have taken as devisee (*a*).

Cases of settlement.

Similarly where, by any assurance—*i.e.*, any instrument other than a will—land was limited to the person or to the heirs of the person who shall thereby have conveyed the same land, such person acquired nothing, but was entitled as of his former estate (*b*). By the Inheritance Act, it is provided that in the case of any such assurance after 31st December, 1833, such person shall be considered to have acquired the same as purchaser (*c*); and further where any person acquires any land by purchase under a limitation to the heirs of his ancestor, whether by assurance after 31st December, 1833, or will, such land shall descend as if the ancestor had been the purchaser (*d*). The common instance of this is a settlement. The settlor (*e.g.*) will be accounted the purchaser, not he from whom the lands descended, nor his (the settlor's) heir.

Failure of heirs.

And now, by 22 & 23 Vict. c. 35 (*e*), s. 19, it is provided that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser, and there shall be a total failure of the heirs of such ancestor, the land shall descend as if the person last entitled had been the purchaser. This is the only case where a person who can be shown to have inherited can be the stock of descent (*f*).

The expression 'land' in the Inheritance Act is most extensive; it extends to every hereditament, thing, or interest

(*y*) S. 1.
(*z*) S. 2.
(*a*) S. 3.
(*b*) 2 Bl. 242.
(*c*) 3 & 4 Wm. IV. c. 106, s. 3.
(*d*) S. 4.
(*e*) Trustee Relief Amendment Act, 1859.
(*f*) Wms. 102.

Chap. IV.

capable of being inherited, whether in possession, reversion, remainder, or contingency (*g*).

Let us suppose John Smith to die intestate possessed of lands in fee simple, or fee tail; subject to the payment of his debts, if there is not sufficient to pay them out of his personal estate, and subject to his widow's right to dower, they will descend. If he were the purchaser, that is, if he had acquired them otherwise than by descent (for instance, if he had purchased them, or they had been devised to him), even though he were the heir of the testator (*h*), they will go to his heir. And he shall be taken to have acquired them by purchase, even though he had no legal seisin of them, but was merely entitled to them (*i*), unless it be proved that he inherited the lands (*k*). Or suppose he had come to the lands by descent, but by a marriage settlement executed since the 31st December, 1833, he had limited the lands to himself for life, and after his death to the first and other sons of the marriage in tail male, and in default of such issue to himself in fee; in such case in the event of his death intestate, without such issue in tail male, the descent will now be traced from him as purchaser (*l*).

On the other hand, suppose John Smith to have taken the lands as heir in tail male, or in fee simple, to his father, Thomas Smith, under a limitation contained in a settlement or will after the 31st December, 1833, to his father, Thomas Smith, for life, with remainder to the first and other sons of his father in tail male, or in fee simple; on the death of John Smith intestate the descent will be traced not from John Smith as purchaser, but from Thomas Smith (*ll*); unless there shall be a total failure of heirs of Thomas Smith, in which case only the descent will be traced from himself (*m*). Similarly if John Smith had inherited the lands simply from his father or grandfather, who had acquired them by purchase, and there was a total failure of heirs of such father or grandfather, the descent will be traced from him, John Smith (*n*).

II. To issue.

II. The second rule is that the land shall, in the first place, descend lineally to the issue of the purchaser *in infinitum*.

(*g*) 3 & 4 Wm. IV c. 106, s. 1.
(*h*) S. 3.
(*i*) S. 1.
(*k*) S. 2.
(*l*) S. 3.
(*ll*) S. 4.
(*m*) 22 & 23 V ct. c. 35, s. 19.
(*n*) *Ib.*

III. The third rule is that the male issue shall be admitted before the female; and where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit, but the females shall inherit all together. In such case the females are called co-parceners, and should they effect a partition of the lands descended to them, they do not by partition become purchasers, but the several parcels of land will descend in the same manner as the individual shares (*o*).

III. Males before females. Eldest male—females equally.

IV. The fourth rule is that the issue of the children of the purchaser 'represent,' or take the place of, their deceased parents *in infinitum*.

IV. Representation by issue of children.

This is called taking *per stirpes*, by the roots or stocks, as distinguished from *per capita*, by the heads or individuals. To take an example: A. has three daughters, C., D., and E., and no sons; C. dies, leaving two sons; D. dies, leaving two daughters; E. dies leaving a daughter, and son younger than the daughter. When A. dies, C.'s eldest son will be entitled to one-third, D.'s two daughters to another one-third as co-parceners, and E.'s son to the remaining one-third.

Per stirpes.

The preceding rules apply as well to the descent of an estate tail as of an estate in fee simple. But when the issue are exhausted the estate tail must determine. Not so in the case of an estate in fee simple, to which the following rules also apply.

V. The fifth rule is that, on failure of the issue of the purchaser, the inheritance shall go to his nearest lineal ancestor.

V. On failure of descendants, to nearest lineal ancestor.

Formerly, on failure of lineal issue of the person last seised, the inheritance descended to his collateral relations, being of the blood of the first purchaser—subject to the three last preceding rules. Now, by the Inheritance Act (*q*), it is enacted that—

> S. 6. "Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue."

(*o*) See 3 & 4 Wm. IV. c. 106, s. 1, "Land"; and *Doe* d. *Crosthwaite* v. *Dixon*, 5 Ad. & El. 834. *Post*, ch. viii.

(*q*) 3 & 4 Wm. IV. c. 106, s. 6.

Chap. IV.

Thus, suppose John Smith, having acquired his land by purchase, to have died intestate without issue, leaving a father and brothers and sisters surviving, the father will inherit in preference to the brothers and sisters. Or, again, suppose John Smith, having acquired his land by purchase, to have died intestate without issue, himself having been the only child of his father, who had predeceased him, but leaving a grandfather and first cousins him surviving, the grandfather will inherit in preference to the cousins.

VI. Preference to paternal line.

VI. The sixth rule is that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor, male or female), is always preferred to the maternal.

In collateral inheritances the male stocks were preferred to the female. So it is provided in continuation of the last rule (*r*), that (1) none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; also, (2) that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and (3) that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed (*s*). In like manner, where there is a failure of male paternal ancestors and their descendants, the mother of his more remote male paternal ancestor or her descendants shall be preferred to the mother of a less remote or her descendants; and where there is a failure of male maternal ancestors and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be preferred to the mother of a less remote male maternal ancestor and her descendants (*t*). After the female paternal ancestors and their heirs, then, comes the mother of the purchaser.

A learned controversy had arisen whether, where, upon failure of the male paternal line, it became necessary for the first time to resort to a female stock, the descent should be traced through the mother of the nearer or more remote ancestor in that line (*u*).

(*r*) S. 6.
(*s*) S. 7.
(*t*) S. 8.
(*u*) 1 St. Bl. 412.

This doubt was settled by the above provisions of the Inheritance Act (*x*).

According to the sixth rule, then, had John Smith died without issue, but (1) leaving his grandfather on his father's side, and his grandfather's mother and his own mother, him surviving; his mother could in no case inherit so long as there lived his grandfather or any of his grandfather's descendants, or his grandfather's mother or any of her descendants. Or (2), suppose him to have left his grandmother on his father's side, and his great grandfather on his father's side; his grandmother and her descendants could not inherit until after the failure of his great grandfather and his descendants. Or (3), suppose that he left no paternal ancestors or mother, but his mother's mother and mother's father's father him surviving; his mother's mother or her descendants could in no case inherit so long as there lived his mother's grandfather or any of his descendants (*y*). Again, suppose John Smith to have left the mother of his father and the mother of his father's father him surviving; the mother of his father's father and her descendants would inherit before the mother of his father and her descendants. In like manner, suppose John Smith to have died, all his relations on his father's side having predeceased him, likewise his mother, but his mother's mother and his mother's father's mother to have survived him, the mother's father's mother and her descendants would be preferred to his mother's mother and her descendants.

VII. To issue of ancestor *in infinitum*—half blood.

VII. The seventh rule is, that the issue of an ancestor *in infinitum* shall represent such ancestor. This is a corollary of the fourth rule, but with the addition that those related by the whole blood to the purchaser, are preferred to those related by the half blood. By the old law the half blood could not inherit, but now it is provided by the Inheritance Act (*z*), that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; but a relative by the half blood is to stand in the order of inheritance next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where such ancestor is a female; so that the brother of the half blood on the part of the father shall inherit next after

(*x*) 3 & 4 Wm. IV. c. 106, s. 8. (*y*) S. 7. (*z*) S. 9.

Chap. IV.

the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother next after the mother (*a*).

Thus, suppose A. to have had one son B. by his wife X., and two sons C. and D., and two daughters E. and F. by another wife, Y.: C. having purchased land dies without issue, his father A. being also dead. D., his younger brother, shall take, or, on failure of him and his issue, the sisters E. and F. shall succeed in preference to B., the eldest brother; but B. (though only of half blood) and his issue will succeed in preference to any collateral relation not descended from their father A., though of the whole blood with C. Again, suppose A. B. to be the purchaser and to die without issue, but leaving two brothers and two sisters, and a half-brother of his mother Z., who has married again since his father's death: so long as any paternal line of A. B. remain, his half-brother cannot inherit, for his mother could not; but, failing the paternal line, next to his mother in the order of succession will come the half-brother, and in preference to any other collateral relation of A. B. *ex parte maternâ*, though of the whole blood of A. B.

III. Succession duty.

It remains to be added that where any person has or shall become entitled to property by the death of another ~~since~~ the ~~16~~th May, 1853, the property was made subject to duty by the Succession Duty Act (*b*); and the duty imposed by the Act was made a first charge on the property. The general frame of the Act is to the effect that the acquisition of an interest in property in the cases and under the circumstances specified in the Act is to constitute a succession, and every succession is made liable to duty (*c*). A receipt and certificate purporting to be in discharge of the whole duty payable exonerates a *bonâ fide* purchaser.

(*a*) 3 & 4 Wm. IV. c. 106, s. 9.
(*b*) 16 & 17 Vict. c. 51.
(*c*) *Wilcox* v. *Smith*, 4 Dr. 40; and see Dart's V. & P. 275 *et seq.*, and 592.

CHAPTER V.

CHATTELS REAL—LEASEHOLDS.

It was pointed out in a former chapter (*a*) that estates in Real Property were to be regarded under the twofold classification of freehold estates, and those less than freehold. Having discussed the former with reference to quantity or duration of interest, we now proceed to the consideration of the latter.

I. Classification and general characteristics.

Estates less than freehold, are of three denominations:— I. Estates at will; II. Estates for years; and, III. Estates by sufferance. All are known under the general designation of 'Chattels Real.'

Chattels real.

The use of the expression 'goods and chattels,' as descriptive of personal or movable property generally, has been already referred to; and the estates under discussion, notwithstanding the immovability of the subject-matter, were ranged under the classification of personalty; but by reason of their connection with land, they were said to savour of the realty, and were called 'chattels real' (*b*).

Creation. Transfer.

A chattel interest in land was not the subject of the feudal fief, and did not require for its creation the solemnity of a feudal investiture, which constituted the great distinction between that which created a freehold interest, and that which created a chattel one only (*c*). As a chattel interest could be created without resort to the formality of the species of assurance required for the creation of a freehold one, so in its transfer also it was not required. But by the Act to Amend the Law of Real Property (*d*), the assignment of a chattel interest in any tenements or hereditaments shall be void at law unless made by deed. But though no assignment by deed have been made, where the landlord has consented to the substitution of the assignee in the place of the original tenant, a new contract will be created on the same terms as that between the landlord and original lessee, where the lease itself need not be by deed (*e*).

(*a*) *Ante*, p. 39.
(*b*) *Ante*, p. 9.
(*c*) *Ante*, p. 40, note (*h*).
(*d*) 8 & 9 Vict. c. 106, s. 3.
(*e*) See *per* Lush, L.J., in *Elliott* v. *Johnson*, L. R. 2 Q. B. 127.

Chap. V.

Devolution.

All three descriptions of chattels real in their incidents partake of the nature of personalty. On the death of the owner, they devolve not upon the heir, the ordinary representative as regards land, but upon the executor or personal representative. Indeed, they would do this even were there expressed a limitation to the heirs; inasmuch as heirs could not succeed to an interest of the character of personalty. And upon an analogous principle, were an attempt made to create an entail in property of this description, no entail could be created; but the interest would vest absolutely in the first taker (*y*). Thus, suppose a gift of a chattel interest to A. and his heirs; the property would on the death of A. devolve on his executors. So, in case of a gift to A. and the heirs of his body, A. would take absolutely, and the property go, not to A.'s issue, but to his personal representative. But an exception occurs in the case of a bequest by Will; thus, if a term of years be bequeathed to A. for his life, and on his death to B., although the whole term is considered to vest in A. during his life, it will vest in B. on his death (*z*).

General devise of lands.

But from the time of Charles I., where in a will there was a general devise of lands and no freeholds to satisfy it, leaseholds would pass, but otherwise if there were freeholds (*a*). And now by the Wills Act (*b*) a general devise of lands, whether there be freeholds or not, will include leaseholds. It is, however, doubtful whether they will now pass under the term 'real estates' (*c*).

Possession.

In reference to a freehold interest, the technical expression by which the estate of the owner is described is 'seisin;' but in reference to a chattel real interest, it is 'possession.' So it is said, as respects the former, that the party was 'seised' of the land; as respects the latter, that he was 'possessed' of the term. This originated in the principle of the feudal system, which ascribed seisin alone to that which was the subject-matter of a fief.

May commence *in futuro*.

It was a doctrine of the feudal law that an estate of freehold could not be limited to commence at a future period, unless in

(*y*) *Ante*, p. 78.

(*z*) Wms. on P. 307.

(*a*) *Rose* v. *Bartlett*, Croke, temp. Car. I. 293.

(*b*) 1 Vict. c. 26, s. 26.

(*c*) In support of the view that they will not pass, reference may be made to *Stone* v. *Greening*, 13 Sim. 390, and *Turner* v. *Turner*, 21 L. J. Ch. 843. On the other hand, see *Wilson* v. *Eden*, 5 Ex. 752; *Nelson* v. *Hopkins*, 21 L. J. Ch. 410; *Gully* v. *Davis*, L. R. 10 Eq. 562, and *Moase* v. *White*, L. R. 3 Ch. D. 763; and see Jarman on Wills, vol. i. p. 675.

the case where the future estate was part only and carved out of another, as in the instance of a remainder limited to take effect after the determination of a previous partial estate, as one for life. The principle was, that the seisin should always be full, since the exigencies of a feudal holding required the actual and present existence of a party to discharge the feudal obligations. Such, at least, was the doctrine of the common law; and though the introduction of uses, as will hereafter appear, introduced some modification of the practice, the theory still continued as regards estates taking effect at common law. In the peculiarity of the footing on which these chattel interests stood, this objection did not apply to them, and an estate to commence at a future period might be granted in respect to them.

II. Estate at will.

These observations will explain the general nature of a chattel estate. We proceed now to consider each of the three classifications of interest specified above; and first, as to an estate at Will.

An estate at Will, is probably the most ancient of this species of interest. We have seen that, in the earlier application of the feudal system, even fiefs were perhaps liable to resumption at the will of the lord (*cc*); and, as these chattel interests probably originated in the habit of a mere letting out to farm portions of the demesne of the lord, it is likely that they too were equally liable to an arbitrary termination.

Definition.

"Tenant at will," says Littleton (*d*), "is where lands or tenements are let by one man to another to have and to hold to him at the will of the lessor; by force of which lease the lessee is in possession." But the law implies it to be at the will of the lessee also (*e*). The tenancy may be created by express agreement, orally or in writing, or by construction of law. Thus, by law, the *cestui que trust* let into possession of the trust estate by the trustee is tenant at will (*f*), though in equity he is absolutely entitled; or where a lease is not in writing, when required by the Statute of Frauds (*g*) to be so, a tenancy at will is created; or where a person has entered and enjoyed lands under a lease which was void (*h*).

Creation.

Determination.

As to what will determine a tenancy at will, Blackstone (*i*) says:—

(*cc*) *Ante*, p. 18.
(*d*) S. 68, ed. by Thomas, vol. i. 637.
(*e*) Co. 55*a*, *ib.*
(*f*) *Melling* v. *Leak*, 16 C. B. 669.
(*g*) 29 Car. II. c. 3, ss. 1, 2.
(*h*) *Denn* v. *Fernside*, 1 Wils. 176.
(*i*) Vol. ii. 146.

Chap. V.

"What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our Courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding them thereon, or making a feoffment, or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to or determines the estate at will."

An assignment, however, by the tenant at will of his interest to a third party is no determination of the tenancy, unless the lessor have notice; in other words, a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (*k*).

A yearly tenancy or from year to year.

An abrupt termination of a tenancy being likely to lead to much practical inconvenience on both sides, in modern times a letting at an annual rent, where not expressly stated to be at will, and where no certain period is limited, has been construed a 'yearly tenancy'—that is, a tenancy from year to year, so long as it suits both parties that the holding should endure. Tenancies of this description are determinable only on formal notice to quit; and the notice which the law prescribes (in the absence of agreement) is one of at least half a year (*l*) before the expiration of the current year of the tenancy. Thus, supposing a letting from year to year, from the 1st January in any year, the notice must be given in or before the previous June, so as that the lease may expire on 31st December. The notice would be bad if directed to an expiration in June and given in January. But a 'customary half-year's' notice is sufficient where the tenancy has commenced on one of the customary feast-days; so that a notice served on 28th September to quit on the ensuing 25th March, will be sufficient in the case of a Lady Day tenancy; but not a notice served on the 26th March to quit on the next 29th September, in the case of a Michaelmas tenancy (*m*).

Determinable by notice.

(*k*) *Pinhorn* v. *Souster*, 8 Ex. 763.

(*l*) 'Half a year' is the proper expression (Paterson, J., *Doe* v. *Smith*, 5 A. & E. 351). The word 'months' means lunar months unless the contrary appear to be the meaning from the subject-matter to which that term is applied (Bayley, J., *Johnstone* v. *Hudleston*, 4 B. & C. 932).

(*m*) *Morgan* v. *Davies*, L. R. 3 C. P. D.

The tenancy cannot be determined by one only of the parties except at the end of any number of whole years from the time it began; but it may be so determined at the end of the first year, as well as subsequent years, with proper notice, unless in creating such tenancy, the parties use words showing they contemplate a tenancy for two years at least (*n*).

Statute of Frauds and Act to Amend Law of Real Property.

By the Statute of Frauds (*o*), it is enacted that every lease not in writing, except where the term does not exceed three years from the making thereof, whereupon the rent reserved shall amount to two-thirds at least of the full improved value, shall have the force and effect of a lease or estate at will only. And, by the Act to Amend the Law of Real Property (*p*), every lease required to be in writing must be by deed also. So that a lease from year to year, where such rent is reserved, can be made by parol; but if a less rent is reserved it must be by deed (*pp*).

Tenancy at will changed to yearly tenancy by payment of rent.

Where rent has been paid, the tenancy at will is converted into a tenancy from year to year (*q*); and though the lease be void under the statute, if the tenant enters and pays rent, he holds from year to year under the terms of the lease in other respects (*r*). Thus, notwithstanding the positive words of the statute, what was then considered a tenancy at will has since been construed to enure as a tenancy from year to year (*s*).

It is said (*ss*) that the words of the statute are satisfied by holding that a parol demise for more than three years creates in the first instance an estate at will strictly so called, which estate at will, when once created, is changed into a tenancy from year to year by payment of rent, or other circumstances indicative of an intention to create such yearly tenancy: one of the incidents of a lease at will is its convertibility, by payment of rent, into a tenancy from year to year: if a party enters and pays, or promises to pay, a certain rent, or settles it in account, a new agreement may be presumed, under which the landlord may have a right to distrain.

Payment of rent must be

But the payment of rent must be in reference to a yearly

260. As to the supposed origin of tenancies from year to year, see *Clayton* v. *Blakey*, 2 Sm. L. Ca. 109.

(*n*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957.

(*o*) 29 Car. II. c. 3, ss. 1 and 2.

(*p*) 8 & 9 Vict. c. 106, s. 3.

(*pp*) See *Wood* v. *Beard*, L. R. 2 Ex. D. 30.

(*q*) *Doe* d. *Rigge* v. *Bell*, 2 Sm. L. Ca. 102.

(*r*) *Ib.* See per Kelly C.B. Martin v. Smith 2 H & C. 57.

(*s*) *Clayton* v. *Blakey*, *ib.* 107.

(*ss*) Notes to ditto, *ib.* 108.

Chap. V.

in reference to a yearly holding.

holding; if not paid with reference to a year or an aliquot part of a year, the tenancy will remain at will only (*t*). The reason is, that payment and receipt with reference to a yearly holding is evidence of the intention of the parties that a yearly tenancy should be created; but it is evidence only, which may be rebutted by evidence of other circumstances showing a contrary intention (*x*).

Tenancy at will may still be created.

A tenancy at will, strictly speaking, may still be created by express words; and it will arise where a person holds rent free by permission of the owner—as a minister placed in possession by trustees for the congregation, or where a person enters under an agreement to purchase, or for a lease, and has not paid rent (*y*). The following instance of a tenancy at will recently came before the writer:—

"This contract is subject to confirmation by the Court of Chancery but as the said purchase-money of £ was offered on the basis of immediate possession being given the purchasers are to be at liberty to enter at once upon the said contracted-for premises upon the terms of tenants at will and at daily rent at and after the rate of £ per cent. per annum on the said sum of £ the balance of the aforesaid purchase-money of £ and in the event of the said contract not being confirmed or in the event of the title not being accepted by the purchasers or the purchaser failing to complete the purchase in due course the purchasers are to immediately vacate the said premises and the vendors are to be at liberty in case of refusal to expel the purchasers and to plead this agreement by way of leave and licence for so doing."

Form of yearly letting.

In the case of a yearly letting made by writing, the following is the form given by Mr. Davidson (*a*):—

"For the term of one year from and so on from year to year until the demise shall be determined at the end of the first or any subsequent year &c."

But for the words 'until, &c.,' such lease would enure as a demise for two years certain at the outset (*b*).

Yearly tenancy not determined by assignment or death.

Unlike the tenancy at will, a tenancy from year to year does not determine by an assignment (*c*), or by the death of either of

(*t*) *Richardson* v. *Langridge*, 4 Taunt. 128.

(*x*) *Clayton* v. *Blakey*, 2 Sm. L. Ca. 113, notes.

(*y*) *Ib.* 112.

(*a*) Vol. v. pt. i. 105.

(*b*) *Denn* v. *Cartright*, 4 East, 32.

(*c*) *i.e.*, the lessor at will having notice *Pinhorn* v. *Souster*, 8 Ex. 772). As to its assignability, see *per* M.R. in *Allcock* v. *Moorhouse*, L. R. 9 Q. B. D. 371.

the parties. The same law as to waste applies—namely, that the tenant is not liable for permissive waste (that is, letting the buildings fall into disrepair), except that a tenant from year to year is bound to keep the house in weather-tight condition (*d*). Waste.

Under the Agricultural Holdings Act, 1875 (*e*), in favor of agricultural tenancies of two acres or more, the half year's notice of which we have spoken, is altered into a year's notice. The Act provides:— Notice under Agricultural Holdings Act.

> S. 51. "Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors."

The operation of the Act may be excluded, wholly or partially, by agreement between the landlord and tenant (*f*).

III. Estate for years.

An estate for Years is thus defined by Blackstone:— Definition.

"An estate for years is a contract for the possession of lands or tenements for some determinate period: and it happens where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon" (*g*).

He continues (*h*)—

"These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were intitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold."

(*d*) *Auworth* v. *Johnson*, 5 C. & P. 241. *Calvert*, L. R. 3 C. P. D. 360.
(*e*) 38 & 39 Vict. c. 92, s. 51.
(*f*) Ss. 54—60; see *Wilkinson* v. (*g*) Vol. ii. 140.
(*h*) *Ib.* 141.

Chap. V.

Entry.

It will be observed, that, in the definition quoted of an estate for years, it is treated as a condition of the estate, that the lessee enter on the lands under the agreement. This is part of the principle which, when interests of land of this description first acquired a recognition in the earlier history of the law, regarded them in the nature of a personal contract only between the lord and the tenant. It was not until the contract was followed up by the acquisition of possession under it, that an actual estate in the lands themselves was considered as arising. The only qualification of this was that, while before entry no action could be maintained by the lessee for a trespass to the lands, the law recognised an assignability in the interest—called an *interesse termini;* it was capable of being transferred or granted over to another. But if the lease were made by a conveyance operating by virtue of the Statute of Uses (of which hereafter), the lessee would have the whole term vested in him as if he had actually entered (*i*).

Interesse termini.

No livery.

Requirements of Statute of Frauds and Act to Amend Law of Real Property.

So completely was the principle of mere contract recognised at common law, that, while the creation by the original grant of a freehold estate in lands required to be accomplished by livery of seisin or formal assurance, down to the passing of the Statute of Frauds in the reign of Charles II., this interest (*i. e.*, an estate for years), however long its duration—say even for a thousand years—might have been created by mere agreement, not necessarily in writing, but verbally, or, as it is termed, by parol, provided only it was accompanied or followed up by actual entry. That statute, however, so far as regarded leases of more than three years, as we have seen, interposed the restriction that none should be effectual unless put into writing and signed by the party, or his agent lawfully authorised in writing. A statute of the present reign, entitled an Act to Amend the Law of Real Property (*k*) has added the still further restriction of a deed, enacting that a lease required by law to be in writing made after 1st October, 1845, shall be void unless made by deed.

Limitation.

The customary limitation of an estate for years has been to a man and to his 'executors and administrators,' though it is sufficient if it be granted to himself only, without mention of his personal representatives; for in these, on his death, the law will

(*i*) Watkins, 300.

(*k*) 8 & 9 Vict. c. 106, s. 3.

vest it without any special words of limitation (*m*). In future the words of limitation will probably be omitted (*n*).

Estoppel.

One somewhat peculiar result flowed out of this doctrine of contract. It would be but equitable that a lessor should be bound by his own contract, and consequently that he who had contracted to grant a lease to another should be considered as warranting to him the possession of the lands under the contract; and similarly that he who had taken the fruits of the possession should not be allowed as against his landlord to dispute his title to grant the lease. This equity the law works out in the case of a lease by indenture under a doctrine called that of 'estoppel,' prohibiting in the one case the grantor to dispute the grant, in the other the tenant to deny his title to make it; and this albeit the grantor had not in fact either the lands or the title at the time. The principle of 'estoppel' is, that what has once been affirmed or represented to be the truth, shall not be contradicted by the affirmant, or those claiming through him, to the disparagement of those who, being in a position to avail themselves of it, have acted on it (*o*).

Term.

Certain beginning.

Certain ending.

Part of the definition of the estate for years is that the interest must be for some determinate period. It is from this that such an interest is ordinarily styled a 'term,' from the Latin word *terminus*, because its duration is "bounded, limited, and determined, for every such estate must have a certain beginning and certain end" (*p*). It may begin from a date antecedent to the date of the lease, and it may commence from a future time, as a lease for a hundred years from next Easter; but it must be for a term of years. As we have seen, a tenancy for life, or for the life or lives of another or others, is an estate of freehold; but a lease to A. for ninety-nine years should he so long live, will give him only a term of years.

But, though every estate for years must have a certain beginning, and a certain ending, it is not necessary that this certainty should be found within the four corners of the document creating the estate. It is sufficient if it have a capacity of certainty about

(*m*) Wms. Exors. 1730.

(*n*) See *post*, p. 152.

(*o*) Not, as Lord Coke says (Co. Litt. 352*a*), "it is called an estoppel because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth," for which reason it has been said to be 'odious,' and that it ought to be construed strictly.

(*p*) 2 Bl. 143.

Chap. V.

it; '*id certum est, quod certum reddi potest.*' Therefore, says Blackstone (*q*):—

"If a man make a lease to another for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease (*qq*). A lease for so many years as J. S. shall live, is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he shall so long continue parson, is good: for there is a certain period fixed beyond which it cannot last; though it may determine sooner on the death of J. S. or his ceasing to be parson there."

Surrender.

The interest may expire either by 'surrender' or 'merger.'

'Surrender' is the yielding up of the term itself to the reversioner, that is, the party out of whose interest it is carved, or who has a right to the possession expectant on its cesser or determination (*r*). This surrender may be either by the act of the party or by implication of law—the one being styled a surrender 'in fact,' the other one 'in law.' The former would take place on any voluntary yielding up of the term—the latter when the party acquires a new interest inconsistent with the continuing duration of the old one, as when a tenant accepts a fresh lease before the expiration of the original one. The mere consent of the tenant to the grant of a new lease to a stranger would appear to amount to the same thing, provided it were accompanied with an actual surrender of the possession (*s*).

Now by the Act to Amend the Law of Real Property (*t*), it is provided that a surrender in writing of an interest in tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed.

Merger.

'Merger' takes place when there is an acquisition of another

(*q*) Vol. ii. 143.

(*qq*) But not so in the case of an agreement for a lease. The date of commencement must be mentioned to satisfy the Statute of Frauds (*Marshall* v. *Berridge*, L. R. 19 Ch. D. 233, overruling *Jaques* v. *Millar*, 6 Ch. D. 153).

(*r*) See *post*, chap. vii. p. 201.

(*s*) *Nickells* v. *Atherstone*, 10 Q. B. 944.

(*t*) 8 & 9 Vict. c. 106, s. 3.

interest inconsistent with that of the term. Says Blackstone (*u*):—

"Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be 'merged,' that is, sunk or drowned, in the greater."

Thus, were the 'termor' (that is, the party in whom the term was vested) to acquire an estate of freehold in the land, even an estate for life (which as we have seen, is larger than any term of years however long), that estate constituting the reversionary interest on the determination of the term, a merger would take place. So even were the reversion to be only another term, and the lessee to become possessed of that term, the first would merge in the second. Thus, suppose a term to be granted to A., and after the expiration of that term one to be granted to B., and A. to acquire B.'s term; the first term would merge in the second. This would take place even were the second term of a shorter duration than the first. Thus, let the term in A. be for 1000 years, and that in B. for 500 only, the 1000 years term would nevertheless merge in the 500 years one by the acquisition (*uu*).

There is, however, one qualification annexed to this doctrine of merger; and that is, the union in the same individual of both estates in the same right. Says Blackstone (*x*):—

"Else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife."

But this qualification of the doctrine extended to those instances only in which one person had the legal ownership in different rights, and in which the law, as distinguished from equity, took notice of those rights. Of trusts the law did not for this purpose take any notice. So in law, notwithstanding one of two estates was held in trust and the other was held beneficially by the same

(*u*) Vol. ii. 177.

(*uu*) *Stephens* v. *Bridges*, 6 Madd. & Gel. 66.

(*x*) Vol. ii. 177.

Chap. V.

person, the doctrine of merger took effect, but equity would interpose to support the trust (*y*). And now by the Judicature Act, 1873 (*z*), it is enacted :—

> S. 25, § 4. "There shall not after the commencement of this Act" (1st November, 1875) "be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

Botes. Estovers. Waste.

In treating of an estate for life, it was pointed out that the tenant for life, notwithstanding his limited interest, had a right to certain petty allowances for fuel, repairs, and the like, under the name of 'estovers' or 'botes'—that is to say, house-bote, fire-bote, plough-bote, and the like; and was also liable to waste. The same perquisites or privileges and the like liability in respect to waste are extended to the tenant for years; but it is doubtful whether he is liable to permissive waste (that is, letting the buildings fall into disrepair) in the absence of stipulation (*a*).

Emblements.

The tenant for years, like the tenant for life, was by the common law entitled to emblements when the expiration of his term depended on an uncertain contingency (as, upon the death of the lessor, being himself tenant for life), though not if it were otherwise; since in the one case, as he could have no certain guide whether to sow the land or not, it would be only just to him that he should have the crops; in the other case, knowing the period of expiration, it would have been his own folly had he sown when aware that he was not to reap the harvest (*b*). By 14 & 15 Vict. c. 25, it is provided that on the determination of leases or tenancies held by tenants at rack rent, *i.e.*, ordinary current rent of the full value, under a tenant for life or for any other uncertain interest, instead of being entitled to emblements, the tenant shall continue to hold on the same terms to the end of the current year of his tenancy.

Rent and covenants.

A contract to pay a fair compensation by way of rent, is implied by law from the fact that lands or tenements belonging to one person have been occupied by another with the permission of the former. Where the tenancy is created by simple contract, that is, not by deed, an action lies for what is called 'use and occupation,' and the fair and reasonable value of the same will be

---

(*y*) 3 Preston, 315.
(*z*) 36 & 37 Vict. c. 66.
(*a*) See *per* Lush, J., in *Woodhouse* v. *Walker*, L. R. 5 Q. B. D. 407. *Ante*, p. 49.
(*b*) 2 Bl. 145. See *ante*, pp. 10 and 46.

recoverable; generally, however, the amount of rent and time of payment are determined by agreement, which is put in writing (*c*). But a lease by deed is made subject to the payment of rent and to the observance and performance of certain covenants, amongst which a covenant to pay the rent is included. Thus, says Mr. J. Williams (*d*):—

"The rent and covenants are constantly binding on the lessee, during the whole continuance of the term, notwithstanding any assignment which he may make (*dd*). On assigning leasehold premises, the assignee is therefore bound to enter into a covenant with the assignor, to indemnify him against the payment of the rent reserved, and the observance and performance of the covenants contained in the lease. The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession, provided that such covenants relate to the premises let; and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself and his 'assigns' to do the act. But a covenant to do any act upon premises not comprised in the lease cannot be made to bind the assignee (*e*). Covenants which are binding on the assignee are said to 'run with the land,' the burthen of such covenants passing with the land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach. In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee individually, yet, as the latter has become the tenant of the former, a 'privity of estate' is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other. This mutual right is also confirmed by an express clause of the statute (*f*), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases (*g*). By the same statute also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims."

(*c*) Bullen & Leake, 234—6.

(*d*) R. P. 389.

(*dd*) See *E. & W. India Dock Co.* v. *Hill*, L. R. 22 Ch. D. 14.

(*e*) Such covenant is personal only (*Keppell* v. *Bailey*, 2 My. & K. 517). See *Luker* v. *Dennis*, L. R. 7 Ch. D. 227, impugning *Keppell* v. *Bailey*, on the doctrine of equity making covenants, though not running with the land at law, binding on the assignee who took with notice. But *quære:* in *Keppell* v. *Bailey* the covenant did not affect the premises demised, while in *Luker* v. *Dennis* it affected the premises assigned, though the covenant was contained in the lease of other premises.

(*f*) 32 Hen. VIII. c. 34, s. 2.

(*g*) *i.e.*, where the lease is by deed (*Bickford* v. *Parson*, 5 C. B. 920; and *Standen* v. *Christmas*, 10 Q. B. 135). But where not by deed the assignee can merely sue for use and occupation. See *ante*, p. 148, and see *Allcock* v. *Moorhouse*, L. R. 9 Q. B. D. 367.

Chap. V.

Assignee of the reversion.

To enable the assignee of the reversion of a lease to take advantage of the proviso for re-entry on breach of covenant it is not necessary that notice of the assignment should have been given to the lessee; except as regards rent, in which case notice may be necessary, for otherwise he might not know to whom to tender the rent (*h*). By the statute 4 Anne, c. 16, s. 9, the necessity for attornment (*hh*) by the tenant to an assignee was taken away, with this proviso, that—

> S. 10. "No such tenant shall be prejudiced or damnified by payment of any rent to any such grantor . . . by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the grantee."

Covenants running with the land.

On the subject of covenants running with the land, the Real Property Commissioners in their third Report (*i*), said:—

"The authorities lay down, 1st, that, in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land, or to, 'a thing in existence parcel of the demise': 2ndly, that, where it respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named: and 3rdly, that when it respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee nor pass to him even though he is named (*k*).

(*h*) *Scaltock* v. *Harston*, L. R. 1 C. P. D. 106.

(*hh*) See *ante*, p. 21.

(*i*) See Davidson, vol. i. p. 125, and *Spencer's Case*, 1 Sm. L. Ca.

(*k*) That is at law (*Thomas* v. *Hayward*, L. R. 4 Ex. 311). This, however, must be now taken as subject to the rule in equity that where the assignee takes with notice of the covenant he may be bound (*Luker* v. *Dennis*, L. R. 7 Ch. D. 227; *Renals* v. *Cowlishaw*, L. R. 9 Ch. D. 125, and 11 Ch. D. 866); and see *Patman* v. *Harland*, L. R. 17 Ch. D. 353, and Conveyancing Act, 1882 (45 & 46 Vict. c. 39, s. 3). Covenants restricting the mode of using the land will be so enforced; but where the case is not one of landlord and tenant, and the covenant cannot be complied with without expenditure of money, *e.g.*, to build and to keep the buildings in repair, the covenant to keep in repair is not within the rule, and, though assigns be named, will not bind them at law or in equity (*Haywood* v. *Brunswick, &c., Building Society*, L. R. 8 Q. B. D. 403, and see *London & S. W. Ry. Co.* v. *Gomm*, L. R. 20 Ch. D. 562; and *Andrew* v. *Aitken*, L. R. 22 Ch. D. 218). In *Haywood's* case it was held that where land had been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, the assignee of the grantee of the land was not liable, either at law, or in equity on the ground of notice, to the assignee of the grantee of the rent-charge on the covenant to repair. Further it seems that, where the obligation is not in a lease, for a covenant restricting the user of the land (*e.g.*, by the purchaser of the land not to build), to bind the assigns in equity, there must have been a laying out of the premises

"These rules appear to have been originally laid down with reference to leases; but authorities are not wanting, in which they have been treated as applying equally to cases not involving the relation of landlord and tenant (*l*). They are usually laid down as constituting the whole of the settled law on this subject, and appear to apply equally, whether we consider the burthen, or whether we consider the benefit of covenants."

To bind the assigns the form of covenant has usually been framed thus:—

"And the said (covenantor) doth hereby for himself, his heirs, executors and administrators, covenant with the said (covenantee), his executors, administrators, and assigns, that he the said (covenantor), his executors, administrators, or assigns, will, &c." (*n*).

But now, by the Conveyancing and Law of Property Act, 1881 (*o*), a covenant relating to land of inheritance shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed; and similarly a covenant relating to land not of inheritance shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed. This applies to covenants made after the 31st December, 1881. Similarly it is also enacted (*p*) that (if and as far as a contrary intention is not expressed in it) a covenant, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, of the person making the same, as if heirs (*q*) were expressed.

By the same Act, it had already been enacted (*r*) that rent reserved by a lease made after 31st December, 1881, and the benefit of every covenant or provision therein, having reference to the subject-matter, and on the lessee's part to be observed or performed, shall be annexed and incident to, and shall go with, the reversion immediately expectant on the term, and shall be capable of being recovered, received, enforced, and taken advantage of by

in lots and a general building scheme, and ~~a mutual contract between the covenantor and covenantee~~ (see *per* Hall, V.C., *Renals* v. *Cowlishaw*, *supra*); but for such case falling within the exception of the class of which *Tulk* v. *Moxhay* (2 Ph. 744) is a leading instance, the covenant would be invalid (except as a personal one between the original parties to it), on the ground that it would cause a tying up of the land in perpetuity.

(*l*) See last note.

(*n*) See 2 Da. i. 418.

(*o*) 44 & 45 Vict. c. 41, s. 58.

(*p*) S. 59.

(*q*) It was never necessary, though usual, to mention executors and administrators, for they were bound at Common Law. (Wms. Exors. 1730.)

(*r*) S. 10.

Chap. V.

the person from time to time entitled, subject to the term, to the income of the land leased. The 'person entitled to the income' is the beneficial owner, to whom also therefore the right to sue is now given; whereas before the legal reversioner alone had such right. Also it is enacted (*s*) that the obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall (if, and as far as, the lessor has power to bind the reversionary estate immediately expectant on the term) be annexed and incident to, and shall go with, that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested; and (if, and as far as, the lessor has power to bind the person from time to time entitled to that reversionary estate) the obligation may be taken advantage of and enforced against any person so entitled.

And it is further enacted (*t*) that (if and as far as a contrary intention is not expressed in it) a covenant with two or more jointly to pay money, or to make a conveyance, or to do any other act, to them or for their benefit, shall imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them or any other person to whom the right to sue on the covenant devolves.

The conjoint effect of these provisions seems to be that, to make a covenant run with the land, the covenantor(s) and covenantee(s) alone need be named, except where before the Act it was necessary to express assigns for them to be bound; there it still is necessary, *e.g.*, where in a lease it is intended to impose an obligation relating to something not *in esse*, as to build a wall; or in case of a sale of part of leasehold premises, and covenant by the vendor to pay the rent apportioned to the unsold part, &c., the vendor must, it seems, still expressly covenant also for his assigns, in order that the burden may run with the land retained (*u*). So that generally, in lieu of the form quoted above, the following simple form will be sufficient: "A. hereby covenants with B. that," &c., or, where the covenant is with two or more jointly, "A. covenants with B. and C. that," &c.

Implied covenants for title under Convey.

But further, by the Conveyancing and Law of Property Act, 1881, it is enacted (*x*) that in a conveyance of leasehold property

(*s*) S. 11.
(*t*) S. 60.
(*u*) See Dart's V. & P. 766; 2 Da. I. 429; and notes by Wolstenholme & Turner to ss. 58 and 60.
(*x*) 44 & 45 Vict. c. 41, s. 7, § 1 (A), (B).

for valuable consideration, other than a mortgage, there shall by virtue of the Act, be implied by the person who conveys (*y*), and is expressed to convey, as beneficial owner, a covenant for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, and for the validity of the lease. But it will be observed that the Act does not provide for the covenant of indemnity against rent and covenants in the lease, by a purchaser on the assignment of leaseholds; nor for a covenant by the lessee to insure against fire. But the Act goes on further to provide that the benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is from time to time vested (*z*).

ancing Act, 1881.

"This subsection," say Messrs. Wolstenholme and Turner (*a*), "makes all covenants implied under this section run with the land so as to be enforceable by every person interested under the conveyance. It precludes any difficulty as to what covenants do or do not run with the land. An implied covenant under this section will therefore be more valuable than the ordinary covenant."

Mortgages.

In mortgages of leaseholds, in order to save the mortgagee from the liability which he would incur in respect of the rent and covenants as assignee of the lease, the mortgage is usually made by demise, and thereby the mortgagee becomes tenant only of the mortgagor. The mortgagor demises the property to the mortgagee, his executors, administrators, and assigns, for the residue of the term, except the last day or last few days thereof; and in the deed is contained a declaration of trust for the mortgagee of the last day (or last few days) of the term, or in the power of sale it is declared that after any sale the mortgagor shall stand possessed thereof in trust for the purchaser (*b*).

As the Conveyancing and Law of Property Act, 1881 (*c*), has enacted (as we have seen) that, in a conveyance of leasehold property for valuable consideration, other than a mortgage, where the person who conveys is expressed to convey as beneficial owner, certain covenants (commonly called 'covenants for title') are implied, so also it enacts (*d*) that, in a conveyance by way of mortgage,

(*y*) 'Convey' includes 'assignment,' the word hitherto ordinarily used in respect of leaseholds. (S. 2 (v.).)

(*z*) S. 7 (6).

(*a*) Note to s. 7 (6).

(*b*) 2 Da. ii. 417.

(*c*) 44 & 45 Vict. c. 41.

(*d*) S. 7, (1), C. and D.

Chap. V.

the person from time to time entitled, subject to the term, to the income of the land leased. The 'person entitled to the income' is the beneficial owner, to whom also therefore the right to sue is now given; whereas before the legal reversioner alone had such right. Also it is enacted (*s*) that the obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall (if, and as far as, the lessor has power to bind the reversionary estate immediately expectant on the term) be annexed and incident to, and shall go with, that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested; and (if, and as far as, the lessor has power to bind the person from time to time entitled to that reversionary estate) the obligation may be taken advantage of and enforced against any person so entitled.

And it is further enacted (*t*) that (if and as far as a contrary intention is not expressed in it) a covenant with two or more jointly to pay money, or to make a conveyance, or to do any other act, to them or for their benefit, shall imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them or any other person to whom the right to sue on the covenant devolves.

The conjoint effect of these provisions seems to be that, to make a covenant run with the land, the covenantor(s) and covenantee(s) alone need be named, except where before the Act it was necessary to express assigns for them to be bound; there it still is necessary, *e.g.*, where in a lease it is intended to impose an obligation relating to something not *in esse*, as to build a wall; or in case of a sale of part of leasehold premises, and covenant by the vendor to pay the rent apportioned to the unsold part, &c., the vendor must, it seems, still expressly covenant also for his assigns, in order that the burden may run with the land retained (*u*). So that generally, in lieu of the form quoted above, the following simple form will be sufficient: "A. hereby covenants with B. that," &c., or, where the covenant is with two or more jointly, "A. covenants with B. and C. that," &c.

Implied covenants for title under Convey-

But further, by the Conveyancing and Law of Property Act, 1881, it is enacted (*x*) that in a conveyance of leasehold property

(*s*) S. 11.
(*t*) S. 60.
(*u*) See Dart's V. & P. 766; 2 Da. I. 429; and notes by Wolstenholme & Turner to ss. 58 and 60.
(*x*) 44 & 45 Vict. c. 41, s. 7, § 1 (A), (B).

for valuable consideration, other than a mortgage, there shall by virtue of the Act, be implied by the person who conveys (*y*), and is expressed to convey, as beneficial owner, a covenant for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, and for the validity of the lease. But it will be observed that the Act does not provide for the covenant of indemnity against rent and covenants in the lease, by a purchaser on the assignment of leaseholds; nor for a covenant by the lessee to insure against fire. But the Act goes on further to provide that the benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is from time to time vested (*z*).

ancing Act, 1881.

"This subsection," say Messrs. Wolstenholme and Turner (*a*), "makes all covenants implied under this section run with the land so as to be enforceable by every person interested under the conveyance. It precludes any difficulty as to what covenants do or do not run with the land. An implied covenant under this section will therefore be more valuable than the ordinary covenant."

Mortgages.

In mortgages of leaseholds, in order to save the mortgagee from the liability which he would incur in respect of the rent and covenants as assignee of the lease, the mortgage is usually made by demise, and thereby the mortgagee becomes tenant only of the mortgagor. The mortgagor demises the property to the mortgagee, his executors, administrators, and assigns, for the residue of the term, except the last day or last few days thereof; and in the deed is contained a declaration of trust for the mortgagee of the last day (or last few days) of the term, or in the power of sale it is declared that after any sale the mortgagor shall stand possessed thereof in trust for the purchaser (*b*).

As the Conveyancing and Law of Property Act, 1881 (*c*), has enacted (as we have seen) that, in a conveyance of leasehold property for valuable consideration, other than a mortgage, where the person who conveys is expressed to convey as beneficial owner, certain covenants (commonly called 'covenants for title') are implied, so also it enacts (*d*) that, in a conveyance by way of mortgage,

(*y*) 'Convey' includes 'assignment,' the word hitherto ordinarily used in respect of leaseholds. (S. 2 (v.).)

(*z*) S. 7 (6).

(*a*) Note to s. 7 (6).

(*b*) 2 Da. ii. 417.

(*c*) 44 & 45 Vict. c. 41.

(*d*) S. 7, (1), C. and D.

Chap. V.

corresponding covenants (*e*) by the person who conveys and is expressed to convey as beneficial owner shall be implied, together with a covenant to pay, observe, and perform all the rents reserved by, and all the covenants, conditions, and agreements in the lease on the part of the lessee, to be paid, observed, and performed, and to keep the mortgagee indemnified against all claims by reason of their non-payment, or non-observance, or non-performance (*f*).

Proviso for re-entry.

The payment of the rent and the observance and performance of the covenants, are further secured by a proviso or condition (*g*) for re-entry by the lessor, on non-payment of the rent or breach of any of the covenants, and for the cesser of the lease thereupon. On the ground that such a condition was entire and indivisible, the law for many centuries was, that, if the landlord gave a licence to do what otherwise would have been ground for forfeiture (*e.g.*, to assign or underlet where the lessee is otherwise prohibited), or, if he actually waived his right of forfeiture after any breach, the proviso for re-entry was destroyed (*h*). It was also the law that a grantee of part of the reversion could not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent should be apportioned by the act of the parties, but the condition was destroyed, for that it was "entire and against common right" (*i*). But the Legislature at length interfered, and in 1859, by Lord St. Leonards' Act to Further Amend the Law of Property (*k*), it was enacted as follows:—

Licence. Effect of.

S. 1. "Where any licence to do any Act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter

(*e*) As to such covenants in the case of a mortgage being absolute instead of qualified, and as to the form of the covenant for quiet enjoyment in mortgages, see *post*, chap. vi. pp. 196, note, and 176.

(*f*) For form of mortgage of leaseholds since Conveyancing Act, 1881, see Wolstenholme & Turner, p. 201.

(*g*) A proviso or condition differs from a covenant in this, that the former is in the words of, and binding upon, both parties, whereas the latter is in the words of the one only.—Wharton.

(*h*) See *Dumpor's Case*, and notes thereto, 1 Sm. L. Ca. 47.

(*i*) Co. Litt. 215*a*, ed. by Thomas, vol. ii. p. 90.

(*k*) 22 & 23 Vict. c. 35, ss. 1—3.

thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter, not specifically authorised or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorised to be done.

Partial licence.

S. 2. "Where in any lease heretofore granted, or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

Apportionment of condition of re-entry.

Severance of the reversion.

S. 3. "Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him."

And now the Conveyancing and Law of Property Act, 1881 (*l*), provides for the apportionment of every condition in a lease made after 31st December, 1881, where the reversion is severed, and includes the case of the avoidance or cesser in any manner of the term as to part of the land, and not only the case of the rent or other reservation being legally apportioned. Reference has been made above (*m*) to the provisions of the Act making the rent and benefit of the lessee's covenants run with the reversion, and similarly the obligation of the lessor's covenants; at the same time,

(*l*) 44 & 45 Vict. c. 41, s. 12. See *Mayor of Swansea* v. *Thomas*, L. R. 10 Q. B. D. 48.

(*m*) *Ante*, p. 151.

Chap. V.

they are made to apply in case of the severance of the reversionary estate (*n*).

And as regards waiver it was enacted in 1860, in the Act to Further Amend the Law of Property (*o*) :—

Waiver. Actual. Effect of.

S. 6. "Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

Implied.

Waiver of the landlord's right to take advantage of the forfeiture, will, however, still be implied, where he, with knowledge of the forfeiture, has received rent accrued since the condition broken (*p*). In reference to such implied waiver, by receipt of rent, it should be observed, that it has been held that where money is paid and received under a lease, a mere protest that it is accepted conditionally, and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt (*q*).

Breach of covenants to insure, &c.

A condition of re-entry was, as Mr. J. Williams said (*r*) :—

"Evidently a very serious instrument of oppression in the hands of the landlord, when the property comprised in the lease is valuable, and the tenant by mere inadvertence may have committed some breach of covenant. To forget to pay the annual premium on the insurance of the premises against fire might thus occasion the loss of the whole property; although, on the other hand, the landlord might well consider such forgetfulness inexcusable, since it might end in the loss of the premises by fire whilst uninsured."

By Lord St. Leonards' Act (*s*) to Further Amend the Law of Property, 1859 (referred to above), a limited power was given to Courts of Equity to relieve against forfeiture for breach of a covenant or condition to insure against fire, which was extended to the superior Courts of Common Law by the Common Law Procedure Act, 1860 (*t*). These enactments have, however, been repealed by the Conveyancing and Law of Property Act, 1881 (*u*);

(*n*) Ss. 10, 11.
(*o*) 23 & 24 Vict. c. 38, s. 6.
(*p*) *Dumpor's Case*, 1 Sm. L. Ca. 53.
(*q*) *Davenport* v. *The Queen*, L. R. 3 App. Cas. 115.
(*r*) R. P. 394.
(*s*) 22 & 23 Vict. c. 35, ss. 4—9.
(*t*) 23 & 24 Vict. c. 126, s. 2.
(*u*) 44 & 45 Vict. c. 41, s. 14 (7), and 2nd sched. pt. ii.

and in lieu thereof, it is enacted in regard to leases made before or after the commencement of the Act, and notwithstanding any stipulation to the contrary, that (with certain exceptions) a right of re-entry or forfeiture, under any proviso or stipulation in a lease, for a breach of any covenant or condition, shall not be enforceable until after service on the lessee of a notice specifying the breach, and, if capable of remedy, requiring him to remedy it, and in any case requiring him to make compensation in money; and until after failure by the lessee within reasonable time to remedy it, if capable of remedy, and to make reasonable compensation to the satisfaction of the lessor. And where the lessor is proceeding to enforce such right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief on such terms as, having regard to all the circumstances, it thinks fit.

The exceptions above referred to are, (1) a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased, or a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or, (2) in case of a mining lease, a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof (*x*).

The above provisions, however, of the Act do not apply to or affect the law relating to re-entry, or forfeiture, or relief, in case of non-payment of rent (*y*).

Non-payment of rent.

Formerly, remedy for non-payment of rent had in all cases to be preceded by demand of the precise rent due at a convenient time, before sunset of the last day on which it could be paid according to the condition of re-entry; but, under the Common Law Procedure Act, 1852 (*z*), the landlord was empowered if half a year's rent be due, and there be no sufficient distress, to proceed at once to a recovery by action of ejectment. It was, however, provided that all proceedings should cease on payment at any time before trial by the tenant of all arrears and costs (*a*); and that thenceforth in the Court of Equity, which formerly would

(*x*) S. 14 (6), (i.) and (ii.).
(*y*) S. 14, § 8.
(*z*) 15 & 16 Vict. c. 76, s. 210.
(*a*) S. 212.

Chap. V.

have relieved the tenant against the forfeiture at any time after ejectment on the same conditions, relief should be obtainable only within six months after execution of the judgment (*b*); and by the Common Law Procedure Act, 1860 (*c*), it was enacted that the same relief might be given by courts of law. By reason, however, of the statute applying only where a half-year's rent is due, and to remedy by bringing action of ejectment, in every well-drawn lease, the right of entry is given for non-payment of rent, whether it have been legally demanded or not. It will be remembered that actual entry on the land is not necessary. It is sufficient that something be done, showing the determination of the tenancy by the landlord (*d*). As Lord Mansfield said (*e*):—

"The reason of the thing is agreeable to the practice" (namely, that entry is unnecessary); "for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the Court passed for the purpose of bringing the right to an examination, an actual entry can be of no service."

Increase of rent.

Before passing from the subject of rent and covenants, it should be observed, that although the lessor can reduce the amount of rent, he cannot increase it during the lease. Thus, supposing a breach of covenant by assignment without licence, and the lessor willing to waive the right of re-entry on condition of an increased rent, to which both parties agree: this can only be carried out by surrender of the existing lease, and grant of a new one at the increased rent. A landlord, who had demised premises for a term of fifty years at £50 a year, agreed with his tenant to lay out £50 in making improvements on them, the tenant undertaking to pay an increased rent of £5 per annum during the remainder of the term (*g*). It was held that the landlord, having spent the money, could recover arrears of £5 per annum as a personal contract; but, said Littledale J.:—

"It is not rent in the legal sense and understanding of the word rent. It could not be distrained for, for there is no lease which embraces it; the lease is for £50 a year, and there is no lease at £55. If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect of the additional £5. The assignee of the term could not be charged with the increased rent;

(*b*) S. 210.

(*c*) 23 & 24 Vict. c. 126, s. 1.

(*d*) *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 196 *et seq.*

(*e*) In *Goodright* v. *Cator* (quoted in *Doe* v. *Rollings*, 198), where the question was whether an actual entry was necessary to maintain an ejectment on a clause of re-entry for non-payment of rent.

(*g*) *Donellan* v. *Read*, 3 B. & Ad. 899.

the assignee of the reversion could not claim it, because it is not annexed to the reversion. If the lessor should die, the rent of £50 would go to his heir or devisee, but the right to this additional £5, being a mere matter of personal contract, would go to his executor. The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, and that, therefore, by operation of law, the old lease is surrendered by such new demise; but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end, and that instead of it a new lease should be created, which, being only by parol, could only have the effect of a lease at will" (*h*).

'Usual quarter-day.'

Where rent is made payable quarterly, it is frequently expressed in the lease that it shall be paid on the usual quarter-days. In the West of England, where the 22nd December is treated as a quarter-day, this expression has given rise to difficulty; therefore in place of it the dates should be stated.

Liability of executor.

The liability of an executor or administrator as such to the rents, covenants, and agreements contained in a lease is now limited by the Law of Property and Trustees Amendment Act (*i*), so as to enable them to assign the lease to a purchaser, and distribute the residuary estate.

The provision is as follows:—

> S. 27. "Where an executor or administrator, liable as such to the rents, covenants, or agreements, contained in any lease or agreement for a lease, granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease, and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein

(*h*) But as to reservation of additional rent in a lease on breach of covenant, see *Weston* v. *Managers of Metropolitan Asylum District*, L. R. 8 Q. B. D. 387; affirmed on appeal, 9 Q. B. D. 404.

(*i*) 22 & 23 Vict. c. 35, s. 27.

Chap. V.

contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed."

Evidence on sale of lease of performance of covenants.

In the case of a sale of land held on lease, it is now provided by the Conveyancing and Law of Property Act, 1881 (*k*), that on production of the receipt for the last payment due for rent before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to such date.

Underlease.

Unless restrained by express covenant (and such restrictive covenant is not a 'usual' covenant) (*l*), the tenant for a term may, without leave from the lessor, make an underlease for any part less than the whole of his term; and the underlessee becomes his tenant—not tenant to the lessor, for there is no privity between them.

Evidence on sale of underlease of performance of covenants.

In the case of a sale of land held by underlease, a provision corresponding to that above referred to in the case of a sale of land held on lease, is made by the Conveyancing and Law of Property Act, 1881 (*m*), that on production of the receipt for the last payment due for rent under the underlease, before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to such date; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

Terms of years.

Mortgage.

Under the English system of conveyancing, the creation of long terms of years—say, 100, 500, or 1000, has been resorted to as the machinery for creating pecuniary charges on land. Thus, a mortgage by the freeholder might be, and formerly was, created by a 'demise,' as it is technically termed, from the mortgagor to the mortgagee, for a term of this duration, which, upon the discharge of the mortgage, was given up or surrendered back again. So, in a family where, subject to a preceding life estate in the parent, the estate is entailed on the eldest son, but it is nevertheless desired to make provision, or 'raise portions,' as it

To secure portions.

(*k*) 44 & 45 Vict. c. 41, s. 3 (4).

(*l*) Dart's V. & P. 169, referring to *Buckland* v. *Papillon*, L. R. 2 Ch. Ap. 67, and *Hopkinson* v. *Crowe*, L. R. 19 Eq. 591.

(*m*) 44 & 45 Vict. c. 41, s. 3 (5).

is called, for younger children, it is usual to limit the estate to the parent for his life, then to trustees for a long term of years—say, 500 years, for the purpose of raising the portions, and subject to that to entail the estate on the son. The result is, that the estate becomes charged in the hands of the trustees with the portions in question, and the parties succeeding to the entail take the estate with this burthen upon it.

Proviso for cesser and assignment of terms.

Formerly, when the purposes for which the term had been created were fulfilled, or had come to an end, the term itself either ceased by reason of a 'proviso for cesser,' as it was called, in the deed creating the term; or otherwise it was kept alive, and, in case of (*e.g.*) the purchase of the fee simple, the term was assigned to a trustee for the purchaser on trust to attend the inheritance, that it might protect him against any incumbrance (*e.g.*, rent-charge), created subsequently to the term, and of which on purchasing he had no notice.

But now, by reason of the Satisfied Terms Act (*n*), when the purpose of the term is fulfilled or at an end, it generally ceases of itself, and it cannot be assigned in trust for a purchaser (*o*). It may, however, be released by the beneficiaries, or surrendered by the termor; or, where there is any doubt as to the person in whom the immediate reversion expectant on the term is vested, assigned to a trustee that it may cease (*oo*).

As to dealing with the term by way of release, Mr. Davidson says (*p*):—

"This method of dealing with and getting rid of a term is very commonly and efficaciously adopted where all the parties beneficially interested in the monies secured by the term are able and willing to join in the conveyance; and it may save considerable expense by avoiding the necessity of tracing the representation to the term, and procuring the concurrence of the trustees. The purchaser must, however, satisfy himself that the trustees, whose concurrence he thus dispenses with, have no costs secured to them by the term unpaid, lest the term should not be really satisfied; and, as a general rule, it will not be safe to rely on this method of extinguishing a term if there have been any dealings with the term in which costs may have been incurred."

The Act itself deals first, with satisfied terms of years, which, either by express declaration or by construction of law, were on

(*n*) 8 & 9 Vict. c. 112.

(*o*) The Act does not apply to copyholds, or customary lands, or leaseholds by sub-demise: see 2 Da. i. 306, note, and 672, note.

(*oo*) See form of surrender, 2 Da. i. 304; of release and of assignment in trust, *ib.* 310, 311.

(*p*) Vol. ii. pt. i. p. 310, note.

Chap. V.

31st December, 1845, attendant upon the inheritance or reversion of any lands; secondly, with terms subsisting at the date of the passing of the Act, or thereafter to be created, becoming satisfied after the 31st December, 1845, and which, either by express declaration or by construction of law, should after that day become attendant upon the inheritance or reversion. As to the first, it provided that every such term should absolutely cease and determine; except that every such term attendant by express declaration should, notwithstanding, afford to every person the same protection as it would have afforded if it had continued to subsist, and for such purpose should be considered in law and equity a subsisting term. As to the second, it provided that every such term, upon becoming so attendant, should immediately cease.

The meaning of a term being 'satisfied' within the Act of Parliament was much discussed in a case in 1872 (*q*), and it seems that a term is not satisfied within the meaning of the Act so long as there remains any useful purpose beneficial to the owner of the term, and consistent with the trust on which, at the date of the transaction, the term was held (*qq*); in other words, the term does not become satisfied within the meaning of the Act, except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person (*r*). The facts in the case were:—A. being lessee of land for 99 years, created a mortgage term, which ultimately became vested in a trustee for the mortgagee, and subsequently acquired the fee. He afterwards became bankrupt. In pursuance of an agreement between his assignees, himself, and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of A., who was married in 1832, should join in the deed for the purpose of releasing her dower, but she refused to execute it, and after the death of A. she filed her bill to enforce her right to dower. It was held that the term was not satisfied, but afforded the purchaser protection against the plaintiff's right to dower. It was added by Lord Selborne, L.C.:—

"I think it right to say, that when I find an express declaration in a

(*q*) *Anderson* v. *Pignet*, L. R. 8 Ch. Ap. 180.

(*qq*) *Per* Selborne, L.C.

(*r*) *Per* James, L.J.

deed that a term not previously satisfied shall, upon becoming satisfied, become attendant upon the inheritance conveyed to a particular purchaser, to be assigned and disposed of and held for his benefit, I do not think the effect of the statute, according to the true construction, is to defeat that trust or to make the term cease for the benefit of somebody else who has not any part or share or interest in the inheritance which is conveyed by that particular deed."

Enlargement of residue of long term into fee simple.

A long term of years not unfrequently exists which is, in fact, in value equivalent to the fee simple, and at the expiration of which evidence of title to the reversion will almost certainly, from the lapse of time, have disappeared. "The usual origin of a long term," say Messrs. Wolstenholme and Turner, "is a mortgage by demise (*rr*) where the right of redemption has been foreclosed, or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it" (*s*).

Now, by the Conveyancing and Law of Property Act, 1881 (*t*), it is enacted that by a deed by any of the persons therein specified, subject to the restrictions therein specified, declaring to that effect, the term may be enlarged into a fee simple where there is a residue unexpired of not less than 200 years, such term, as originally created, being for not less than 300 years; provided that it is without any trust or right of redemption in favor of the freeholder or

(*rr*) Under Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 15), it was provided that the person exercising the power of sale by that Act conferred should have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only should be conveyed to and vested in the purchaser by such deed. In *Hiatt* v. *Hillman*, 19 W. R. 694, it was held that the effect of this section was to enable mortgagees, to whom leaseholds had been mortgaged by demise, to assign to a purchaser, on a sale under the statutory power, the whole of the original term, and not only the term demised; and it would seem that the enactment would enable a mortgagee by demise of freeholds to convey the freehold interest, and the personal representative of a mortgagee in fee to convey the legal estate to a purchaser (2 Da. ii. 88). The above provision is, however, repealed by s. 71 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and under s. 21 it is provided, as under the ordinary power of sale in a mortgage deed, that "a mortgagee exercising a power of sale conferred by that Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights, which have priority to the mortgage."

(*s*) Wol. & T. p. 103; see also Dart's V. & P. 294.

(*t*) 44 & 45 Vict. c. 41, s. 65.

Chap. V.

other person entitled in reversion, and that there is no rent having a money value payable in respect of it (*u*). And it is provided (*x*) that the estate in fee simple acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been enlarged.

A doubt having arisen whether this enactment applied only to a term immediately under a fee or not, it has been further enacted by way of amendment, by the Conveyancing Act, 1882 (*y*), that the above enactment shall apply, and be deemed to have always applied, whether the term has, as the immediate reversion thereon, the freehold or not; but not where the term is liable to be determined by re-entry, or has been created by sub-demise out of a superior term, which itself is incapable of being enlarged.

IV. Estate by sufferance.

The remaining estate to be explained is that by Sufferance. It arises when one having come into possession of land under a lawful demise wrongfully continues the possession after its determination. Thus, a tenant under a lease for ten years, holding over after the expiration of the ten years without leave, would be a tenant at sufferance; or, in case of a tenancy from year to year, and notice to quit at the end of the year duly given, if the tenant hold over he will be in by sufferance (*z*).

Remedies for holding over.

The possession, however, having been originally rightful, before the landlord could maintain an action of trespass, he must, said Blackstone, declare the wrongfulness of the possession by some public and avowed act, as by entry or legal process of ejectment, which might then be followed up by an action of trespass for the damages (*a*). Statutes, however, have from time to time been passed for the relief of landlords, some by visiting the tenant with double rent as the consequence of his holding on: others in the way of summary remedy before a magistrate, and so forth. The statutes entitling the landlord to be paid at the rate of double the yearly rent are 4 Geo. II. c. 28, and 11 Geo. II. c. 19: the former in the case of the tenant's holding over after notice from the landlord, the latter after notice given by himself of his intention to quit.

(*u*) For forms of such deed, see Wol. & T. pp. 263, 264.

(*x*) S. 65 (4).

(*y*) 45 & 46 Vict. c. 39, s. 11.

(*z*) See *Doe* v. *Smaridge*, 7 Q. B. 957 —a leading case.

(*a*) 2 Bl. 150.

CHAPTER VI.

ESTATES ON CONDITION (INCLUDING MORTGAGES OF FREEHOLDS).

I. Conditional estate—what.

REFERENCE was made in a former chapter (*a*) to an early doctrine of the law which, in the case of a limitation to one and the heirs of his body, treated the estate as a fee, conditional only on the fact of issue being born; also (*b*) to cases in which the penalty of a forfeiture was incurred by non-compliance with the implied condition on which the estate was held, as in the instance of a tenant for life or years asserting a higher or more extensive ownership than that conferred on him by his grant.

In the main, however, the estates already considered have been of an absolute character. It remains to point out a modification of ownership which exists in the case in which an estate is said to be one upon condition; every one of the different classifications of estates which have been under consideration (estates for life, estates in tail or in fee, estates of freehold or not of freehold), may become the subject of, and have superadded to them, this modification.

An estate is said to be one upon Condition, when either its original existence, or its subsequent enlargement or defeasance, depends upon the happening or not happening of some uncertain event. That event is usually referred to as a 'condition,' and the estate itself is termed 'conditional.'

A condition may be either implied or expressed.

Condition implied.

An implied condition is that which, though not avowed in terms, is part of the essence of the gift, and consequently the condition of its possession. Thus, in the case of the grant of an office, which may sometimes amount to a freehold interest, and may be limited to one even in perpetuity, there is implied the condition that the grantee shall duly execute the office, or it shall revert to the donor with the right of appointment of a successor (*c*).

(*a*) *Ante*, p. 64; and see p. 84.

(*b*) *Ante*, p. 22; and see p. 45.

(*c*) A man may have an estate in an office to him and his heirs, or for life, or for a term of years, or during pleasure only (Co. Litt., ed. by Thomas, vol. i.

Chap. VI.

Says Littleton (*a*) :—

"If a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in Law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will."

So the tenant for life, or tenant for years, was held to take the estate upon an implied condition that he would not set up a pretence to an interest larger than his actual interest in the lands,—the former that he would not attempt to alienate in fee, the latter that he would not do an act in assertion of a right to the freehold. It was because the doing of either would be in breach of the implied condition under which the estate was held, that the obnoxious act involved a forfeiture of the estate itself (*b*).

Condition expressed.

A condition expressed is one in terms declared in the grant creating the estate, and is technically termed a condition 'in deed' (*conditio facti*) (*c*). A condition of this nature may be 'precedent' or 'subsequent.'

Conditions :— Precedent, Subsequent.

As their names respectively denote, a condition 'precedent' is one which precedes the creation or enlargement of the estate itself, its performance alone giving birth to such new estate. A condition 'subsequent' is one which comes into operation after the estate has arisen; by the failure or non-performance of which an estate already vested may be defeated (*d*). Thus, a condition 'precedent' is when an estate is granted to one for life, upon condition that if the grantee pay to the grantor a certain sum of money at such a day, then he shall have the fee simple; in this case the condition precedes the estate in fee, and on performance thereof he gains the fee simple. A condition 'subsequent' is when a man grants to another his estate, in fee, upon condition that the grantee shall pay to him at such a day a certain sum, or that his estate shall cease: here the condition is subsequent and

---

236, note),—*durante bene placito*, as were the judges of the Superior Courts at Westminster until 12 & 13 Wm. III. c. 2, which altered it to *quamdiu bene se gesserint*. The office of Great Chamberlain was in fee simple (Co. Litt. 165*a*, ed. by Thomas, vol. i. 116, Hargr. n.); the office of keeping the church of Our Lady of Lincoln was intailed, and so was the office of Marshall of England (Co. Litt. 19*b*; *ib.* 514).

(*a*) S. 378, *ib.* 237.

(*b*) 2 Bl. 153.

(*c*) Co. Litt. 201*a*, ed. by Thomas, vol. ii. 2.

(*d*) 2 Bl. 154.

following the estate, and upon the performance thereof continues and preserves the same; so that a condition precedent gets and gains the thing or estate made upon condition, by the performance of it; as a condition subsequent keeps and continues the estate by the performance of the condition (*e*).

Again, suppose the case of a mortgage creating an estate in the mortgagee absolute in the first instance, with a proviso that if the mortgage money were paid on a particular day the estate granted should become void; this would be a condition subsequent, operating to defeat, or, technically, 'in defeasance of' the estate in the mortgagee. Such mortgage was in form a conveyance with a proviso or condition, either in the same or a separate deed, for making it void on payment of the mortgage debt and interest on a given day. But, says Mr. Davidson (*f*):—

"This form was extremely objectionable, on account of the strictness with which conditions are construed, and of the difficulty of preserving evidence of the payment of the mortgage-money on the exact day appointed. The money was seldom paid on the day appointed, and it became the practice to procure a reconveyance from the mortgagee on all occasions, so as to render it certain that the legal estate had been again vested in the mortgagor."

Though the distinction between conditions precedent and conditions subsequent is, says Mr. Jarman (*g*), "sufficiently obvious in its consequences, yet it is often difficult, from the ambiguity and vagueness of the language (*e.g.*), of the will, to ascertain whether the one or the other is in the testator's contemplation." And he gives instances of both in cases which have arisen, but from which no general rules can be deduced for determining to which class they belong. In the case of a condition subsequent a difficulty often arises from its not being stated within what period the condition is to be performed; and this gives rise to the question in each case whether the person to perform it has his whole life or only a convenient time within which to perform it; and in the latter case a further question arises, namely, what is a convenient time.

Conditions subsequent.

Pure condition.

Conditional limitation.

Conditions subsequent may exist either under the strict form of a condition, or in the form of what is termed a 'conditional limitation.' In the former, the condition is something superadded

(*e*) *Terms de Ley*, quoted by Wharton.

(*f*) Vol. ii. pt. ii. 521.

(*g*) Vol. ii. 2.

Chap. VI.

upon the original limitation of the estate—for example, an estate to A. and his heirs with a proviso that if he marry a particular woman the estate shall cease. In the latter, the condition is incorporated into and forms part of the original limitation—for example, a gift to A. and his heirs, tenants of the Manor of Dale, constitutes the tenancy a condition of the existence of the estate: the moment the tenancy of the manor ceases, that moment does the estate determine, and this not by way of engrafted condition, but as part of the terms of grant: the estate as originally created is, in truth, a base (or qualified) fee, for it must be determined whenever the qualification is at an end (*h*). Another instance would be a gift in trust for a man for life, until outlawry or bankruptcy, or alienation of the property (*i*).

The distinction between a condition and a limitation has been thus expressed:—

"A limitation marks the utmost time of continuance; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate. Thus, A. gives lands to B. for twenty years. In this case the estate may endure to the end of that period, so that it may be fully completed. The space of twenty years is the period for which the estate is to continue; and the words, appointing this to be the time of continuance, are called the limitation, from their ascertaining the boundary of the estate. But if a clause introduced by, and concluding in words of condition, is added, that if somewhat shall be done, or omitted by either of the parties, or by any other person in the meantime, that then the term of twenty years shall cease and be void, this is a clause of condition; and on the rise of the event on which the term is to cease, or be avoided, and a pursuit of title by entry or claim, the condition will put an end to the estate of the person to whom the limitation is made, and of all persons claiming under him, though the period to which it was extended in its limitation, is not yet arrived" (*k*).

And it is said in Fearne's Contingent Remainders (*l*):—

"It seems now agreed, that wherever in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance the estate is devised over to another, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that, upon the breach or non-performance of it (as the case may be), the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate. Thus, indeed, is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger; and enforcing the performance of

(*h*) 2 Bl. 154.
(*i*) See form, 4 Da. 273.
(*k*) Prest. Est. 22.
(*l*) Vol. i. 272, 10th ed.

the condition, by the determination of the preceding estate upon the breach of it; notwithstanding that preceding estate be limited to the heir himself. And limitations of this sort are properly called conditional limitations."

The distinction between the two classes is perhaps somewhat refined, but it exhibits certain practical results. Thus in the case of the pure condition, where the estate subject to it amounts to a freehold, the law leaves it to the party entitled to the benefit of the condition to take some active step towards its enforcement, before it recognises the condition or its breach, and consequently enjoins on him to make an entry on the lands before it treats the estate as determined. An actual entry would not now be necessary; formerly bringing an action of ejectment, now an action for possession would serve the same purpose. For, as Wilde, C.J., said (*m*):—

"It has become common learning that an actual entry is only now necessary in one case, and that is, to avoid a fine with proclamations; and the only ground upon which it is held to be necessary in that case is the supposed stringency of the express words of the Statute of Fines, 4 Hen. VII. c. 24" (*n*).

Accordingly Blackstone says (*o*):—

"When an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of £40 by the grantor, or so that the grantee continues unmarried, or provided he goes to York, &c.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate."

It is otherwise, however, when the estate is not one of freehold. Thus, if a lease for years be made on condition that, if the lessee goes not to Rome before such a day, the lease shall be void, the lease is *ipso facto* void upon the breach of the condition without any entry by the lessor, but if the lease had been for life, an entry would have been necessary before it could have been defeated (*p*).

In the case of the conditional limitation the estate terminates by the act itself. Thus Blackstone says (*q*):—

(*m*) In *Doe* v. *Rollings*, 4 C. B. 196.

(*n*) This was in 1847. It will be remembered fines were abolished by 3 & 4 Wm. IV. c. 74.

(*o*) Vol. ii. 155.

(*p*) Co. Litt. 214*b*, ed. by Thomas, vol. ii. p. 87—"A lease for years may begin without ceremony, and so end without ceremony." See *ante*, pp. 137, 144.

(*q*) Vol. ii. 155.

Chap. VI.

"When land is granted to a man, so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500 and the like. In such cases the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the £500) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy."

Stranger taking benefit of condition.

So again, under the common law it was not open to a stranger to take advantage of a pure condition subsequent, or to enter for its breach. This was reserved to the grantor or his heirs; and the right of entry could not be assigned. Thus, to take the common case of a lease, with a provision for avoidance and re-entry on non-payment of rent; there, had the grantor assigned over his estate to another, that other could not have availed himself of the condition. On the other hand, in the case of the conditional limitation, the estate itself ceasing to exist, any party entitled to enter upon its termination, whether stranger or not, might have done so. Thus, if a man make a lease until A. shall return from Rome, and afterwards grant the reversion over to another, such grantee, on the return of A. from Rome, shall be entitled to enter, the interest of the lessee being then determined by the terms of the limitation itself (*r*).

The incapacity, however, of strangers to take the benefit of these conditions was a doctrine only of the common law, and, as regards the grantees of reversions upon leases for life or years, was remedied by statute so far back as the reign of Henry VIII. (*s*), it being found to press hardly on the grantees from the Crown of the lands of the dissolved monasteries (*t*). That statute enacted that as well the grantees of the Crown as all other persons being grantees or assignees, their heirs, executors, successors, and assigns, shall have the like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of rent, or for doing of waste, or other forfeiture; and the same remedies by action only for not performing of other conditions, covenants and agreements, as the lessors or grantors themselves, or their heirs or successors, might at any time have had or enjoyed (*u*). The Act applies only to leases by deed (*x*).

(*r*) Co. Litt. 214*b*, see vol. ii. ed. by Thomas, p. 87.

(*s*) 32 Hen. VIII. c. 34.

(*t*) Wms. 244.

(*u*) Quoted *in extenso* in *Wright* v. *Burroughes*, 3 C. B. 692.

(*x*) *Standen* v. *Christmas*, 10 Q. B. 135. See *ante*, p. 149, note.

Now, under the Act to Amend the Law of Real Property (*y*), a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed. It would appear, however, that this does not apply to the case of a condition in a lease broken before alienation of the reversion (*z*). Pollock, C.B., said :—

"We think that the 8 & 9 Vict. c. 106, does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains."

And again, Maule, J., said :—

"It does not mean a right of entry for a forfeiture, but a right of entry in the nature of an estate or interest, that is, where a person by lapse of time has lost everything except his right of entry."

Jessel, M.R., explains (*b*) :—

"The reason why a right of entry for condition broken was not assignable by virtue of 8 & 9 Vict. c. 106, s. 6, may be taken to be, that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition."

By the Conveyancing and Law of Property Act, 1881 (*c*), it is enacted in regard to leases made since 1881, that every condition of re-entry and other condition therein contained, shall go with the reversionary estate immediately expectant on the term, and shall be capable of being enforced and taken advantage of by the person subject to the term entitled to the income of the land leased (*d*).

Also by the Wills Act (*e*), all rights of entry for conditions broken and other rights of entry may be disposed of by will.

Conditions :— Impossible, Illegal, Repugnant.

Conditions operating by way of defeasance to an estate, are themselves also subject to three stipulations—namely, that they must be neither impossible, nor contrary to law, nor repugnant to the estate itself.

In the case of a condition precedent being or becoming impossible to be performed, the estate will not arise ; but, in the

(*y*) 8 & 9 Vict. c. 106, s. 6.

(*z*) *Hunt* v. *Bishop*, 8 Ex. 675 ; and see *Hunt* v. *Remnant*, 9 Ex. 635, and *per* Maule, J., 630.

(*b*) *Jenkins* v. *Jones*, L. R. 9 Q. B. D. 131.

(*c*) 44 & 45 Vict. c. 41, s. 10.

(*d*) Query—Does not this include right of entry for condition broken ? See *Jenkins* v. *Jones*, L. R. 9 Q. B. D. 131.

(*e*) 1 Vict. c. 26, s. 3.

Chap. VI.

case of a condition subsequent, the estate will become absolute (*f*); so also if the condition be illegal; and conditions which are repugnant to the estate are absolutely void (*g*).

The following examples are given by Blackstone (*h*) :—

> "If a feoffment be made to a man in fee simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day; (within which time the woman dies, or the feoffor marries her himself) or unless he kills another; or in case he aliens in fee; then, and in any of such cases, the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed."

Another instance of illegality would be a devise subject to a condition in general restraint of marriage; there the limitation over would be of no effect (*i*). But not so where the object of the testator was not to restrain marriage, but to provide for a person while unmarried; as, where the gift was subject to a proviso that the lady should remain in her present state of single woman, but if she should change such state, then the gift for her life should go over to another, it was held there was nothing illegal in the proviso, and on her marriage her estate ceased (*k*).

The above sufficiently illustrate the avoidance of a condition by its impossibility or illegality; but the case of avoidance by repugnancy may require somewhat more explanation. Suppose an estate were granted to one, whether for life, in fee, or for years, it would be the natural result of such a grant that the donee should have the power of dealing with the property to the extent of his interest in it, and consequently, whatever that interest might be, of alienating it. To annex to such a grant a condition that the party should not alienate, would be at variance with, in other words repugnant to, the very grant itself; such a

---

(*f*) See recent case of *Dawson* v. *Oliver-Massey*, L. R. 2 Ch. D. 753, and judgment of James, L.J., 760. There the required consent to marriage had become impossible by death of the party to consent.

(*g*) 2 Bl. 156, and 2 Jarman on Wills, chap. xxvii.

(*h*) Vol. ii. 157.

(*i*) *Morley* v. *Rennoldson*, 2 Ha. 570.

(*k*) *Jones* v. *Jones*, L. R. 1 Q. B. D. 279.

condition, accordingly, the Court would hold to be void (*kk*). This must not be confused with a limitation of an estate to a man for his life, until he shall become bankrupt or charge it, and after his bankruptcy, &c., over; for there the condition amounts to a limitation, reducing the interest short of a life estate, and is not like an attempt to give it to him for his life, with a proviso that he shall not sell or alien it, repugnant to the estate (*l*). Such condition, however—namely, that the tenant for life was to hold it only till bankruptcy—would be repugnant if the estate had belonged to the tenant for life and been settled by him (*e.g.*) on marriage (*m*). The provision, therefore, that a married woman should not dispose of, by way of anticipation, the income of property settled to her separate use, would appear to be a repugnant condition; but it is not so, for, separate use being the creature of equity, equity may limit her power in aliening property which without equity she would have no power to alien (*n*).

Name and arms clause.

Difficult questions have from time to time arisen in respect of clauses in wills and settlements, enjoining persons to whom estates are limited in strict settlement to take the name and use the arms of the settlor. The question has in some cases turned on whether the clause referred to created a condition precedent to the vesting of the estate, or a condition subsequent, or a conditional limitation in defeasance of the estate (*o*). The clause when introduced should be so framed as to prevent these questions arising; particularly care should be taken to limit the time within which the condition is to be performed, and a gift over on failure to perform it should be introduced (*p*).

Says Mr. Davidson (*q*):—

"The Name and Arms Clause is sometimes framed so as to prescribe the assumption of the specified name and arms by every person coming into possession; but the proviso shifting the property, though capable of attaching to the series of estates tail, cannot attach to the ultimate estate in fee simple, for the double reason that it would come into collision with the rule against perpetuities, and that the specified mode of going over, namely, to the next in remainder, would be inapplicable. Hence, it appears the more correct course expressly to restrict the clause to the estates for life and in tail."

(*kk*) See for a very recent instance, *In re Machu*, L. R. 21 Ch. D. 838.

(*l*) *Brandon* v. *Robinson*, 18 Ves. 433, *per* Lord Eldon. *Ante*, p. 110.

(*m*) *In re Pearson*, L. R. 3 Ch. D. 807.

(*n*) *Brandon* v. *Robinson*, 18 Ves. 435. *Ante*, p. 118.

(*o*) See 3 Da. i. 351 *et seq.*

(*p*) See form, 3 Da. ii. 1142.

(*q*) Vol. iii. pt. i. 364, note.

Chap. VI.

The limitations over, being collateral to estates tail, are capable of being barred by a disentailing assurance, and therefore do not fall within the rule against perpetuities (*r*).

Equity will sometimes relieve.

Where there is no gift over, and the condition is of a nature to admit of compensation being made, equity will, on subsequent performance, relieve against a forfeiture incurred. "But," says Mr. Hayes, "after all, legatees must not presume too confidently on their licence to disregard conditions which are not enforced by a bequest over, since the cases do not very precisely define the limits of the doctrine" (*s*).

II. Mortgages, what—at law.

Among estates held upon condition are included mortgages. We have seen (*t*) how this was in the case of a mortgage under the old form. Now, a mortgage of freeholds is in form a conveyance of lands absolutely by the mortgagor, who borrows the sum of money, to the mortgagee who lends it, but subject to an agreement (called the 'proviso for redemption') that if the mortgagor repay the sum lent with interest on a day named, the mortgagee will reconvey the premises. At law, the estate in fee simple at once passes to the mortgagee, but subject to the condition that he will re-convey upon payment on the day named. So entirely has the legal estate passed to the mortgagee, that, unless there be a re-demise to the mortgagor (to be spoken of presently), the period of limitation (also to be spoken of presently), within which the mortgagee may bring his action to recover the premises mortgaged, will be calculated from the date of the execution of the mortgage-deed (*u*). Again, in the case of any mortgage made before the 31st December, 1881, except by agreement in writing after such date between the mortgagor and mortgagee (*x*), the mortgagor cannot, without the mortgagee joining, grant a lease, and then the covenants on the lessee's part must be entered into with the mortgagee that they may run with the land (*y*). It is, however, provided by the Judicature Act, 1873 (*z*) that:—

S. 25, § 5. "A mortgagor, entitled for the time being to the pos-

(*r*) 3 Da. i. 364, note.

(*s*) Hayes & Jarman on Wills, 402—409. Six points chiefly to be attended to in framing clauses of this nature are given. See *ante*, p. 156, as to the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), giving relief against forfeiture for breach of covenants and conditions in leases.

(*t*) *Ante*, p. 167.

(*u*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*x*) 44 & 45 Vict. c. 41, s. 18, § 16, *post*, p. 177.

(*y*) Form, 2 Prid. 53. And see 1 Da. 116.

(*z*) 36 & 37 Vict. c. 66, s. 25, § 5.

session or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

The right of retaining possession till the day named for payment is sometimes preserved to the mortgagor (*a*), the stipulation that he shall remain in possession operating as a re-demise (*b*); but, if the day named for payment pass without payment, the mortgagee may enter or bring an action for possession, even against a tenant, without giving notice to quit, if such tenant claim under a lease from the mortgagor granted after the mortgage without the privity of the mortgagee (*c*), and thus obtain possession.

The doctrine was first decided and most clearly enunciated (*d*) by Lord Mansfield as follows:—

"This is an ejectment, brought for a warehouse in the City, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit: so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the Court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the Home Circuit; but there the mortgagee was privy to the lease, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in

(*a*) But not in forms by Davidson. There mortgagor covenants with mortgagee for quiet enjoyment after default (see p. 176).

(*b*) Notes to *Keech* v. *Hall*, 1 Sm. L. Ca. 579.

(*c*) *Keech* v. *Hall*, 1 Sm. L. Ca. 577.

(*d*) In *Keech* v. *Hall*, 1 Sm. L. Ca. 574.

Chap. VI.

the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a Court of Equity goes upon a mistake. It emphatically belongs to a Court of Law, in opposition to a Court of Equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a Court of Equity must follow, not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightfully admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go, to a great extent, to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession."

But though an agreement, to be collected from the mortgage deed, that the mortgagor shall remain in possession for a time certain, operates as a re-demise, an agreement that the mortgagee may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, cannot operate as a re-demise for want of certainty (*f*). In Davidson's Forms, therefore, to prevent any question whether there has been a re-demise to the mortgagor, there is no proviso or covenant for quiet enjoyment by the mortgagor till default; but the covenant for quiet enjoyment by the mortgagee is made to commence in operation after default. This does not postpone the mortgagee's right of entry (without notice or demand (*g*), as where the relationship of landlord and tenant has been created between mortgagee and mortgagor) (*h*), or disable him from bringing his action for possession at once (*i*). The same form of covenant is implied under the Conveyancing and Law of Property Act, 1881 (*k*).

(*f*) Notes to *Keech* v. *Hall*, 1 Sm. L. Ca. 580. See *ante*, p. 145.

(*g*) Fisher on Mortgages, 443.

(*h*) *Ib.* 444.

(*i*) *Doe* v. *Lightfoot*, 8 M. & W. 553; and 2 Da. ii. 111, and see form, *ib.* 314.

(*k*) 44 & 45 Vict. c. 41, s. 7 (1) (C).

Power of leasing under Conveyancing Act, 1881.

Now, in the case of a mortgage made after the 31st December, 1881, by the Conveyancing and Law of Property Act, 1881 (*l*), power is given to the person in possession, whether mortgagor or mortgagee, to make or agree to make (*m*) an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years. The rent and benefit of the lessee's covenants and the obligation of the lessor's covenants will be annexed to and go with the reversionary estate in the land immediately expectant on the term (*n*). For the protection of the mortgagee in the case of a lease by the mortgagor, the latter is to deliver to him within one month after making the lease a counterpart of the lease duly executed, when by deed (*o*). But such power is given only if and as far as a contrary intention is not expressed in the mortgage deed, or otherwise in writing; and the mortgage deed may reserve to or confer on the mortgagor or the mortgagee, or both, further or other powers of leasing than those given by the Act (*p*).

The same provisions or any of them may be applied to a mortgage made before January 1st, 1882, by agreement in writing after 31st December, 1881, between mortgagor and mortgagee (*q*).

Power of sale by mortgagor under Conveyancing Act, 1881.

A wholly new power, namely, for sale of lands subject to a mortgage or other incumbrance (*r*), and discharge of the incumbrances on sale, is given by the same Act (*s*). The Court may, on the application of any party to the sale, direct or allow payment into Court of sufficient to meet the incumbrance, including costs, expenses, and interest, to be held for the persons interested; and upon payment the Court may declare the land freed from the incumbrance (*t*).

It will be remembered that in the old form of mortgage, in place of the proviso for redemption, was a condition that on payment on the day named, the conveyance should become void (*tt*). Hence, the origin of the term 'mortgage' is thus given by Littleton:—

(*l*) 44 & 45 Vict. c. 41, s. 18.
(*m*) §§ 12, 17.
(*n*) Ss. 10—11.
(*o*) S. 18, §§ 11, 17.
(*p*) S. 18, §§ 13, 14. As to the detrimental effect on the mortgagee of excluding the mortgagor's power of leasing, see note by Messrs. Wolstenholme & Turner, p. 55.
(*q*) S. 18, § 16.
(*r*) S. 2 (vii.).
(*s*) S. 5.
(*t*) See also s. 16, entitling mortgagor to inspection of title deeds relating to the mortgaged property in the mortgagee's custody or power.
(*tt*) *Ante*, p. 167.

Chap. VI.

"If a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., £40 of money, that then the feoffor may re-enter, &c., in this case the feoffee is called tenant in *morgage*, which is as much to say, in French, as mortgage, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c." (*u*).

In equity—what.

Such is a mortgage at law, which regarded the estate as the mortgagee's absolutely, and devisable or descending to his heir. But equity regarded him only as having a security for the money lent, which belonged to his personal estate, and so at death devolved on his executors or administrators, for whom the devisee or heir was but a trustee of the bare legal estate.

And now, by the Conveyancing and Law of Property Act, 1881 (*x*), it is enacted that where an estate or interest of inheritance, or limited to the heir as special occupant (*xx*), in any tenements or hereditaments is vested (on any trust or) by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives from time to time, in like manner as if the same were a chattel real. But this applies only in cases of death after the 31st December, 1881.

Equity of redemption.

On the principle that the property mortgaged is but a security for the repayment of the money lent, in equity a reconveyance of the estate will be decreed, even after the day named for payment has gone by, on payment of the principal, interest and costs; and notwithstanding the mortgagee has entered. This right of relief is called the mortgagor's 'equity of redemption.' The relief, however, can only be granted within certain limits. The Act for the Limitation of Actions and Suits relating to Real Property (*y*), in the case of a mortgagee in possession, restricted the exercise of the right of redemption to a period of twenty years next after the time the mortgagee should have taken possession, unless in the meantime there should have been an acknowledgment in writing by the mortgagee of the right of the mortgagor, in which

Statutory limits.

(*u*) S. 332, ed. by Thomas, p. 33. This derivation was doubted by Mr. J. Williams, R. P. p. 417.

(*x*) 44 & 45 Vict. c. 41, s. 30.

(*xx*) *Ante*, p. 43.

(*y*) 3 & 4 Wm. IV. c. 27, s. 28.

case the power of redemption was to date from the period of acknowledgment.

Now by the Real Property Limitation Act, 1874 (*z*), which came into operation on 1st January, 1879, the mortgagor is to be barred at the end of twelve years from the date of the mortgagee obtaining possession, or acknowledging in writing the title of the mortgagor or his right to redemption.

Corresponding statutory limits to mortgagee's rights.

On the other hand, in the case of a mortgagee who had not obtained possession, doubts having arisen as to the effect of the first mentioned Act, an Amendment Act (*a*) was passed, giving to the mortgagee the right of recovery at any period within twenty years from any payment which may have been made in respect of either principal or interest, although more than twenty years have elapsed since the right of entry, or to bring action or suit, had first accrued. In a reported case (*aa*), the mortgage was made more than twenty years before ejectment brought, but the mortgagor had within twenty years paid interest; the defendant had been let into possession more than a year before the mortgage by the mortgagor, and suffered by him as a favor to occupy the premises without payment of rent or any written acknowledgment. Here, though the mortgagor's right of entry against the defendant was barred under the principal Act (*b*) (which enacted that no action, &c., could be brought to recover land but within twenty years next after right of action, &c., accrued), it was held that the later Act preserved to the mortgagee the same right of entry as if the former Act had not been passed; and, as the defendant's possession would not have been adverse before that, the mortgagee was entitled to recover.

Now, under the Act of 1874 (*bb*), the Amendment Act is to be read as if the period of twelve years had been therein mentioned, instead of the period of twenty years. And (*c*) it is enacted that no action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, &c., but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the

(*z*) 37 & 38 Vict. c. 57, s. 7.
(*a*) 1 Vict. c. 28.
(*aa*) *Doe* v. *Eyre*, 17 Q. B. 370.
(*b*) 3 & 4 Wm. IV. c. 27, s. 2.
(*bb*) 37 & 38 Vict. c. 57, s. 9.
(*c*) S. 8. This applies also to the personal remedy on a covenant or bond to pay the money: *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511; and *Fearnside* v. *Flint*, *ib.* 579.

Chap. VI.

principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given. Says Mr. Davidson (*c*):—

> "It may be worth remarking how great an interval in the progress of jurisprudence is marked at one extremity by the term 'mortgage' applied according to Littleton's etymology (*cc*); and at the other extremity, by the rule 'once a mortgage always a mortgage,' by which, in spite of the terms and primary import of the contract, it is, in the view of the law, necessarily and unalterably a pledge, unless and until, by judicial process, or by the operation of the Statutes of Limitation, the character of creditor is exchanged for that of owner."

Enforcement of equity.

Equity, when gone.

The mortgagor can avail himself of his equity of redemption, either by bringing against the mortgagee an action to redeem, or by way of answer to an action by the mortgagee. But, besides being limited (as above mentioned) as against the mortgagee in possession, his equity will be gone if the mortgagee obtains a decree absolute for foreclosure against him, which he may do if repayment is not made within reasonable time. Such action, like the mortgagor's for redemption (except in cases within the jurisdiction of the County Courts) (*d*), must be brought in the Chancery Division of the High Court (*e*); and, of course, the equity of redemption will be gone after sale of the mortgaged property, whether under the power in the mortgagee (to be presently noticed) or by the Court.

Notice before repayment.

As it has been usual to provide that the mortgagee shall not exercise his power of sale for six months after notice, so, if the day named for repayment of the loan pass without repayment, the mortgagee is entitled to six months' notice in writing that the mortgagor will repay, or to six months' interest in lieu of notice (*f*). Now, under the Conveyancing and Law of Property Act, 1881, the power of sale conferred by that Act may be exercised after three months' notice (*ff*).

(*c*) 2 Da. ii. 7.

(*cc*) *Ante*, p. 178.

(*d*) *i.e.*, where the amount does not exceed £500.

(*e*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 34, § 3.

(*f*) 2 Da. ii. 34 & 35.

(*ff*) 44 & 45 Vict. c. 41, s. 20 (i.).

Equitable mortgage.

Notwithstanding the Statute of Frauds, which requires an agreement relating to lands to be in writing (*g*), a mere deposit of deeds without any writing, as a security for a loan, will operate as an equitable mortgage in respect of the lands comprised in the deeds; on the principle that such deposit is evidence of an agreement to make a mortgage (*h*).

The question has been much discussed, to what remedy is the depositee entitled (*i*). But it was decided that where there had been a deposit of deeds simply, the remedy was by foreclosure (*k*); but where the deposit was accompanied with a memorandum whereby the depositor agreed to "execute a good and effectual mortgage," the equitable mortgagee was held entitled to foreclosure or sale, and a sale was ordered under the Chancery Practice Amendment Act, 1852 (*l*). Now under the provisions of the Conveyancing and Law of Property Act, 1881 (*m*), it would seem the Court can direct a sale in either case, for it can do so in any action, whether for foreclosure, or for sale, or for the raising and payment in any manner of the mortgage money.

Foreclosure.

At any time after the day of payment appointed in the proviso for redemption, the mortgagee may bring his action for foreclosure of the equity of redemption in the mortgaged premises against the mortgagor (*n*). The mortgagor is entitled to six calendar months from decree to redeem; and, if such time be not enlarged, the mortgagee is then entitled to an order for foreclosure absolute. And suppose the mortgagor to have brought his action against the mortgagee for redemption, the dismissal of such action by reason of the money not being paid at the appointed time is equivalent to an order absolute for foreclosure (*o*).

Sale —under order of Court.

By the Chancery Practice Amendment Act (*p*), the Court was empowered in any suit for the foreclosure of the equity of redemption in any mortgaged property, to direct a sale instead of foreclosure on such terms as it might think fit. The operation

(*g*) 29 Car. II. c. 3, s. 4.

(*h*) *Ex parte Haigh*, 11 Ves. 403.

(*i*) See Fisher on Mortgages, 508, and 2 Da. ii. 69.

(*k*) *James* v. *James*, L. R. 15 Eq. 153; and *Backhouse* v. *Charlton*, L. R. 8 Ch. D. 444.

(*l*) 15 & 16 Vict. c. 86, s. 48; *York Union Banking Company* v. *Artley*, L. R. 11 Ch. D. 205. As to the proper form of such foreclosure order, see *Lees* v. *Fisher*, L. R. 22 Ch. D. 283.

(*m*) 44 & 45 Vict. c. 41, s. 25; repealing (*ib.* (6) and 2nd sched. pt. ii.) the 48th section of 15 & 16 Vict. c. 86.

(*n*) See form of claim in App. C. No. 14, Judicature Act Rules—Forms.

(*o*) 2 Da. pt. ii. 36.

(*p*) 15 & 16 Vict. c. 86, s. 48.

Chap. VI.

of this section was limited, and it has been repealed by the Conveyancing and Law of Property Act, 1881 (*q*), and thereby the relief by sale is given not only to the mortgagee, but also to any person entitled to redeem. It provides that such person may have a judgment or order for sale instead of for redemption in an action brought by him for redemption alone or for sale alone, or for sale or redemption in the alternative (*r*). And it empowers the Court in any action whatever for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, if it thinks fit, to direct a sale of the property on such terms as it thinks fit, and without allowing any time for redemption or payment (*s*). This power may be exercised at any time by the Court before foreclosure absolute (*t*). And the Court is empowered in an action brought by a person interested in the right of redemption to direct the plaintiff to give security for costs, and to give the conduct of the sale to any defendant (*u*). In the case of bankruptcy of the mortgagor, the mortgagee may apply to the Bankruptcy Court for sale of the mortgaged property, and the Court may order a sale accordingly (*x*).

—under mortgage deed, or statutory power.

In modern practice there has been introduced into the mortgage deed a power of sale by the mortgagee in default of payment of the debt, whereby he is enabled, without reference to the mortgagor or to the Court, to sell the property and repay himself out of the proceeds (*xx*). By Lord Cranworth's Act (*y*), a power of sale, with its subsidiary powers, was made incident to mortgages; but, as in the main the power given by the Act was less beneficial to the mortgagee than that usually inserted in a mortgage deed, it has been the custom to continue to insert the power in the deed, thereby varying the powers or incidents conferred by the Act, without negativing the operation of the Act altogether (*z*).

Now, by the Conveyancing and Law of Property Act, 1881 (*a*), the above enactment has been repealed; but such repeal is not to affect the operation, effect, or consequence of any instrument

(*q*) 44 & 45 Vict. c. 41, s. 25, § 6.

(*r*) S. 25, § 1.

(*s*) S. 25, § 2.

(*t*) See *Union Bank of London* v. *Ingram*, L. R. 20 Ch. D. 463.

(*u*) 44 & 45 Vict. c. 41, s. 25, § 3. See *Woolley* v. *Colman*, L. R. 21 Ch. D. 169; and *Weston* v. *Davidson*, W. N. (1882), p. 28.

(*x*) Bankruptcy Rules, 1870, r. 78.

(*xx*) For forms, see 2 Da. ii. 308, and Da. Conc. Prec. 150.

(*y*) 23 & 24 Vict. c. 145, pt. ii.

(*z*) See s. 32. As to the objections to relying on the powers under Lord Cranworth's Act, see 2 Da. pt. ii. p. 89; Fisher, vol. i. p. 500.

(*a*) 44 & 45 Vict. c. 41, s. 71.

executed before the 1st January, 1882. And by the same Act, in regard to mortgage deeds executed after 31st December, 1881, if and as far as a contrary intention is not expressed in the deed, a power of sale, with its incidents, similar to what has been usually inserted in a mortgage deed (including the power to give a receipt for the sale money, or for any money or securities comprised in his mortgage or arising thereunder), is conferred on the mortgagee by the Act, in the same way as if it had been conferred by the deed (*aa*). The provisions of the Act in this respect may be varied or extended by the deed (*b*).

Mortgagee entering into possession.

In addition to the above remedies the mortgagee may enter into possession of the mortgaged property; but that is a course which he is usually slow to adopt. The law in regard to this is thus stated by Mr. Davidson (*bb*):—

"After default has been made in payment of the principal money or interest, or immediately after the execution of the mortgage if there be no proviso for quiet enjoyment by the mortgagor until default, the mortgagee may enter into possession of the land, or, by giving notice to the tenants, into the receipt of the rents and profits; but the situation of a mortgagee in possession is far from an eligible one. On the principle that a mortgagee must make no advantage out of his mortgage beyond the payment of principal, interest, and costs, he (if in possession as mortgagee, though not if he has entered in any other character) is bound to account upon terms of great strictness. The common decree is for an account of what he has received, or what he might have received, without his own wilful default. He is chargeable with an occupation rent in respect of property in hand, and is liable for voluntary waste (as in pulling down houses, or opening mines); and it is by no means a matter of course that he should be allowed the cost of improvements. He may charge his actual expenses, but cannot stipulate for an allowance or commission to himself for the trouble of collecting the rents; nor can he on any pretext charge for his trouble in collecting the rents."

By the Conveyancing and Law of Property Act, 1881 (*c*), in the case of a mortgage deed executed after 31st December, 1881, power is conferred on the mortgagee in possession to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament.

Receiver.

In continuation of the passage above quoted, Mr. Davidson proceeds:—

"But, although the mortgagee is precluded from charging for his own

(*aa*) Ss. 19—22.
(*b*) S. 19 (2).
(*bb*) 2 Da. pt. ii. pp. 90—92.
(*c*) 44 & 45 Vict. c. 41, s. 19 (1) (iv.).

Chap. VI.

trouble in collecting, he is not obliged in all cases to take that trouble. He may, of his own authority, appoint a receiver, whenever the distance or the nature of the property is such as would require much time and trouble for the collection of the rents, and may allow and charge a reasonable remuneration for the services of such receiver. The remuneration allowed is generally five per cent. on the amount of rents collected; it may, of course, be less; but, unless in very extraordinary cases, it should not exceed that rate. A receiver so appointed, is, of course, the agent of the mortgagee only. His possession is that of the mortgagee, who is chargeable with equal strictness, whether he receives the rents himself or through his agent. In either case, his position (as it has been sometimes expressed) is that of a bailiff without a salary, accountable to the mortgagor, but not paid by him. In order to enable the mortgagee to avail himself of the mortgage security (especially for keeping the interest regularly paid), without either incurring the responsibilities of a mortgagee in possession (*cc*) or having recourse to his power of sale, it is usual, where any difficulty is apprehended, for the mortgagee to require from the mortgagor an attornment or power of distress in respect of or over such part of the mortgaged property as may be in hand, by which (except so far as the operation of the clause is affected by the Bills of Sale Act, 1878) he acquires the same remedy by distress as a landlord has for recovering rent in arrear; and, in respect of the property in the occupation of tenants, the appointment of a receiver, who is in law the agent and attorney of the mortgagor, and in respect of whose acts and receipts the mortgagee is, consequently, under no liability, but who is, in effect, the nominee of the mortgagee, and continued during his pleasure, and whose special duty it is to pay the mortgagee out of the rents received. The provisions of the class here described are more commonly restricted in their objects to providing for the regular payment of interest; but, of course, they may be, and sometimes are, extended to providing for the liquidation of the principal by instalments or otherwise."

Statutory power to appoint receiver.

The power of appointing such receiver was conferred on mortgagees by Lord Cranworth's Act (*d*), but though the statutory powers thereby given were as beneficial, or nearly so, to the mortgagee as those commonly conferred by the mortgage deed (where it contains any such power), they have sometimes been thought to be unduly stringent on the mortgagor, in subjecting him to the liability of having a receiver appointed (as the Act authorises) if the mortgage money remains owing beyond the stipulated time, though there be no other default. It has there-

(*cc*) It has more recently been laid down that while the mortgagee thereby acquires the rights of a landlord, he also incurs the liabilities of a mortgagee in possession, and must account for the rent which, but for his wilful default, he might have received. See *In re Stockton Iron Furnace Co.*, L. R. 10 Ch. D. 335; also *Ex parte Bunnett*, L. R. 16 Ch. D. 226; *Re Threlfall*, *ib.* 274; *Ex parte Voisey*, L. R. 21 Ch. D. 442; and *Morton* v. *Woods*, L. R. 4 Q. B. 293.

(*d*) 23 & 24 Vict. c. 145, pt. ii.

fore been sometimes thought expedient to exclude the operation of this statute. These provisions of Lord Cranworth's Act have, to the extent above mentioned, been repealed (*e*), and in lieu thereof have been enacted, in the Conveyancing and Law of Property Act, 1881 (*f*), with regard to mortgages executed after 31st December, 1881, powers corresponding to those usually inserted (if any) in a mortgage deed, for the mortgagee to appoint a receiver of the income of the property when the mortgage money has become due, but not until he has become entitled to exercise the power of sale conferred by the Act.

Insurance.

For the protection of the property mortgaged, where the mortgage includes buildings, it has been usual to provide in the deed that the mortgagor should keep the buildings insured, and that on his failure to do so, the mortgagee might pay what was necessary for the purpose, and add the amount to the mortgage debt (*ff*). Lord Cranworth's Act (*g*) conferred a power on the mortgagee to pay the insurance on omission of the mortgagor to do so, where by the terms of the deed he ought to pay. But the provisions of that Act being very incomplete, it has been the practice to continue to insert the usual provision in the deed. And now the Conveyancing and Law of Property Act, 1881 (*h*), in regard to a mortgage deed executed after 31st December, 1881, has conferred on the mortgagee the powers of insurance usually inserted in mortgage deeds; the Act at the same time, to the extent above mentioned, repeals the provisions in this respect of Lord Cranworth's Act.

Pursuing all remedies at once.

While on the subject of the mortgagee's remedies, it should be mentioned that, contrary to the general rule that a person liable to be sued is not to be harassed by a multiplicity of actions, it is the right of the mortgagee, so long as any part of his debt remains unpaid, to enforce at the same time all his legal and equitable remedies (*k*). He may at the same time enter and take possession of the property (or bring his action for it), sue the mortgagor on his covenant to pay, and proceed to foreclose the equity of redemption of the property (*l*) (or obtain a judicial sale). If, however, having foreclosed, he sell, and the proceeds of sale do not cover his debt, he cannot then sue on the covenant. The

(*e*) 44 & 45 Vict. c. 41, s. 71. *Ante*, p. 182.
(*f*) 44 & 45 Vict. c. 41, ss. 19 & 24.
(*ff*) For form, see 2 Da. ii. 307, and Da. Conc. Prec. 174.
(*g*) 23 & 24 Vict. c. 145, pt. ii.
(*h*) 44 & 45 Vict. c. 41, ss. 19 and 23.
(*k*) Fisher, (vol. i. p. 321)
(*l*) *Cockell* v. *Bacon*, 16 Bea. 159.

Chap. VI.

reason is that the mortgagor, on payment of the whole debt, is entitled to redeem the property, and for that purpose, if necessary, to 'open' the foreclosure; thus, where having obtained foreclosure, the mortgagee sues on the covenant, alleging that the value of the property is not sufficient to satisfy the debt, the foreclosure will be opened; but this manifestly cannot be done when the mortgagee, having sold the property, has deprived himself of the power of restoring it to the mortgagor on full payment (*m*). This, however, does not affect the right of the mortgagee to sue for the balance of his debt, if after sale under his power of sale, or by the Court in lieu of foreclosure, there is a deficiency. The probability of a deficiency would seem to give a right to sell in preference to a foreclosure (*n*).

Descent or devolution of equity of redemption.

On whom is the burthen of the debt.

Locke-King's Act, &c.

The equity of redemption is considered in equity as an estate in the mortgagor, and therefore alienable by him, and it will descend on his death to his devisee or heir, according as he dies testate or intestate—in other words, he is deemed the owner of the land as before, subject only to the charge; the debt being a personal debt for which the lands are a security. Accordingly, on the death of the mortgagor, the debt was payable in the first instance out of the personal estate of the mortgagor, and the land could only be resorted to if the personal estate was not sufficient to pay. This, however, was altered by the statute commonly called Locke-King's Act (*o*) from the 1st January, 1855, except as regards persons claiming under a will, deed, or document, antecedent to that date. By that Act it was enacted that the heir or devisee of the land should not be entitled to have the debt discharged out of the personal estate or other real estate of the deceased; but, as between the different persons claiming under or through the deceased, the land was to be primarily liable, unless by his will or deed, or other document, the deceased had signified any contrary or other intention. A general direction by a testator in his will that his debts were to be paid out of his estate, was held to be an expression of a contrary intention; and therefore also a direction to pay them out of his residuary real and personal estate: in each of such cases the devisee was allowed to take the mortgaged land discharged of the debt (*q*). In consequence of

(*m*) *Lockhart* v. *Hardy*, 9 Bea. 356.
(*n*) Fisher, vol. i. p. 515.)
(*o*) 17 & 18 Vict. c. 113.
(*q*) See *Stone* v. *Parker*, 1 Dr. & Sm. 212.

these decisions an amendment Act was passed (*r*), by which it was enacted that in the construction of the will of any person dying after 31st December, 1867, a general direction for payment of debts out of the personal estate should not be deemed to be a declaration of intention contrary to or other than the rule established by the former Act, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication, referring to all or some of the debts charged by way of mortgage on the real estate. It was further provided that in the former Act and the amending Act the word 'mortgage' should extend to any lien for unpaid purchase-money upon lands purchased by a testator. It will be observed that the latter Act speaks only of a general direction for payment of debts out of personal estate; also that the word 'mortgage' is made to extend to a lien for unpaid purchase-money only in respect of lands purchased by a testator, omitting the case of the purchaser having died intestate; also that in the original or principal Act the heir and devisee alone are mentioned, and therefore a mortgage of leaseholds which, though chattels real, being personalty descend not to the heir or devisee, but devolve on the personal representative or legatee, was not included, and the second Act made no difference in this respect (*s*). To supply these omissions a third statute (*t*) was passed extending the application of the two previous Acts to "a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure" at the time of his death charged with payment of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money. Thus the rule established by Locke-King's Act was made to apply to leaseholds as well as to freeholds, and to a lien for unpaid purchase-money in respect of lands purchased by an intestate, as well as those purchased by a man who had made his will. Further, the Act provided that the devisee, or legatee, or heir, shall not be entitled to have the mortgage debt or other charge discharged out of any other estate of the deceased, unless (in the case of a testator) he shall have signified a contrary intention, which shall not be deemed to be signified "by a charge of, or direction for, payment of debts upon or out of residuary real and personal estate, or residuary real

(*r*) 30 & 31 Vict. c. 69.
(*s*) *In re Wormsley's Estate*, L. R. 4 Ch. D. 665.
(*t*) 40 & 41 Vict. c. 34.

Chap. VI.

estate;" thus entirely getting rid of the idea that any general direction for payment of debts signified a contrary intention, and, in fact, recognising (at any rate as regards persons dying after 31st December, 1877) the explanation of a declaration of a contrary intention first given by Giffard, V.C. (*u*), and subsequently followed by other judges (*x*)—namely, that it must be "a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them." It should be added that where real estate and personal estate are comprised in the same mortgage, the debt must be borne rateably by the real and personal estate subject thereto (*y*), to the value of their respective portions. And so in the case of different portions of a mortgaged estate being devised to different persons, the devisees must contribute accordingly (*z*).

Alienation of equity of redemption: 1. By mortgage.

We have said that the equity of redemption may be alienated by the mortgagor, and have treated of its descent on his death. We will now consider his alienation of it during his life—(1) by way of mortgage; (2) by way of sale. It will have been understood that after the first mortgage of the land there is nothing left to the mortgagor with which to deal except the equity of redemption. As a protection to subsequent, or, as they are often called, 'puisne' (*a*) mortgagees or incumbrancers, it has been provided by the Statute of Clandestine Mortgages (*b*), that if a person shall further mortgage lands, a former mortgage being in force and not discharged, and not discover to the second or other mortgagee the former mortgage or mortgages, the mortgagor shall have no relief or equity of redemption against such mortgagee or mortgagees, and they shall take the land as against him freed from such equity, and as fully as if the conveyance had been on an actual purchase (*c*). Further, by the Acts to further Amend the Law of Property, 1859, 1860, any (seller or) mortgagor, or his solicitor, or agent, who conceals any instrument material to the title or any incumbrance from the (purchaser or) mortgagee (*d*), in order to induce him to accept the title with intent to defraud, shall

Statutory protection to mortgagees.

(*u*) *Nelson* v. *Page*, L. R. 7 Eq. 27.

(*x*) Jessel, M.R., in *Gall* v. *Fenwick*, 43 L. J. Ch. 178; and *Sackville* v. *Smyth*, *ib.* 494; and Malins, V.C., in *Lewis* v. *Lewis*, L. R. 13 Eq. 227.

(*y*) *Trestrail* v. *Macon*, L. R. 7 Ch. D. 656 (*per* Hall, V.C.). And see *Leonino* v. *Leonino*, L. R. 10 Ch. D. 460.

(*z*) See *Re Newmarch*, L. R. 9 Ch. D. 13, and judgment of Jessel, M.R., giving a short epitome of these Acts.

(*a*) *i.e.*, lower in rank.

(*b*) 4 & 5 Wm. & Mary, c. 16.

(*c*) Fisher, vol. i. p. 726.

(*d*) Omitted by accident from earlier statute.

be guilty of a misdemeanor, and liable to fine or imprisonment, and also liable to an action for damages at the suit of the (purchaser or) mortgagee or those claiming under them (*e*). The Act of Wm. & Mary, however, does not take away from the mortgagor the legal right of redemption (that is, on payment on or before the day named), and reserves the right of redemption to subsequent mortgagees (*f*). The equity of redemption is, in fact, transferred to them absolutely. Thus, a second or third mortgagee may redeem the estate from the prior incumbrancers by paying their debts; and, if there are no incumbrances subsequent to their own, they will become absolutely entitled to the land in law and in equity.

Tacking.

We have now to consider the position of the mortgagees *inter se*, a mortgage having been made to (say) a third mortgagee without notice of the second mortgage. The doctrine was laid down by Hale, C.B., and others, so long ago as 22 Car. II. (*g*), and still prevails, that a mortgagee, without notice of a 'mesne,' that is, intermediate incumbrance, purchasing the first incumbrance, shall thereby protect his estate against any person having a mortgage subsequent to the first incumbrance, though he purchased such first incumbrance after he had notice of the subsequent incumbrance. Lord Hardwicke thus explains the doctrine (*h*):—

"As to the equity of this Court, that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general; and was so in *Marsh* v. *Lee*, by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio*: that is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and I believe, was rightly settled only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this: because the jurisdiction of law and equity is administered here in different courts, and creates different kind of rights in estates; and therefore as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, this Court never thought fit, that by reason of a prior equity against a man, who had a legal title, that man should be hurt, and this by reason of that force this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a

(*e*) 22 & 23 Vict. c. 35, ss. 24, 25; and 23 & 24 Vict. c. 38, s. 8.

(*f*) S. 4.

(*g*) *Marsh* v. *Lee*, 1 W. & T. L. Ca. in Eq. 659.

(*h*) In *Wortley* v. *Birkhead*, 2 Ves. Sen. 573.

Chap. VI.

question; for if the law and equity are administered by the same jurisdiction, the rule *qui prior est tempore potior est jure*, must hold. This has gone so far (and the original case was), that if a puisne incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit; for in *Marsh* v. *Lee* there was a *lis pendens*, yet was not the party affected with it; and so, I take it, in general it would be, notwithstanding a *lis pendens*; because the principle upon which all these cases depend is this, that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third that will affect him; for then, no act he can do will help him. Then a *lis pendens* is nothing but notice: an actual notice is certainly as good as that by a *lis pendens*; it will not, therefore, affect him. That was *Marsh* v. *Lee* and the other cases, which I agree to. But no case is cited wherein a puisne incumbrancer, a party in a cause, and a decree made in that cause for satisfaction of incumbrancers according to their respective priorities, has taken in a prior to tack to his puisne incumbrance, that he shall be allowed to make use of that in any other shape than that original incumbrancer would be. I am of the same opinion as Lord Cowper was in *The Earl of Bristol* v. *Hungerford*, in general, and do think it would be most mischievous and pernicious if the Court should allow that doctrine of tacking to be carried to that extent."

The mortgagee then, who purchases the first incumbrance, is said to tack it on to his puisne incumbrance. The second mortgagee, though he give notice of his advance to the first, cannot prevent the third from tacking if he obtained his security without notice (*i*). It will be understood then, that being without notice when he took his security (*k*), is the sole equity which places the subsequent mortgagee on an equal footing with the mesne mortgagee; and obtaining the legal estate gives him the priority. In like manner, the first mortgagee having the legal estate, if he make a further advance without notice of an intermediate incumbrance, the second mortgagee cannot redeem the prior incumbrance without redeeming the puisne or third incumbrance at the same time (*l*). It was for many years held, that where the original mortgage was expressly made a security for further advances, and a second mortgagee lent his money with notice of this, the first mortgagee might tack his further advances made subsequently to the second mortgage, though he had notice of it, for it was the folly of the second mortgagee; but this doctrine

(*i*) *Peacock* v. *Burt*, 4 L. J. (N. S.), Ch. 35; and *Wortley* v. *Birkhead*, 2 Ves. Sen. 571, note.

(*k*) *Marsh* v. *Lee*, 1 W. & T. 659.

(*l*) *Per* Lord Hardwicke, *Morret* v. *Paske*, 2 Atk. 53; Fisher, § 1007; *Wyllie* v. *Pollen*, 11 W. R. 1081.

has been overruled, and now, if the first mortgagee make a further advance with notice of the mesne incumbrance, he will not be entitled to priority in respect of such further advance (*m*).

2. By sale.

There remains to consider the effect of alienation of his equity of redemption by way of sale by the mortgagor, as it affects the purchaser. The purchaser, unless a mortgagee, or paying off a mortgage out of the purchase-money, will stand in the position of the mortgagor; but if he is a mortgagee, or in the position of one by payment off of a mortgage, he cannot set up his mortgage against any of the subsequent incumbrances of which he had notice (*n*); such, at least, is the present doctrine, but it has been doubted, and would not, it seems, be extended.

The doctrine of *Toulmin* v. *Steere*.

The facts in *Toulmin* v. *Steere* (*o*) were as follows:—

The property in question belonged to Witts, subject to a mortgage in fee to Harrison. In 1805 Ann Simpson purchased an annuity secured on the estate, she having notice of the mortgage. In 1806, Witts further mortgaged to Wilby, who paid off the mortgage to Harrison, and took a transfer to himself. Trustees (with sanction of the Court of Chancery) bought the property from Witts, paid Wilby both mortgage debts, and he joined in the conveyance. The trustees purchased with constructive notice of the annuity, but it did not appear whether Wilby had, at the time of his loan, any notice of it. It was held that the estate remained subject to the annuity (*p*).

In a recent case (*q*), Jessel, M.R. (on appeal) said:—

"Assuming *Toulmin* v. *Steere* to be binding upon us, it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption, in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further. Now in a Court of Equity it has

---

(*m*) *Hopkinson* v. *Rolt*, 9 H. of L. C. 514; Fisher, vol. ii. p. 613; *Marsh* v. *Lee*, 1 W. & T. 672. As to what was construed as notice, see *post*, chap. ix., and *Saffron Walden Building Society* v. *Rayner*, L. R. 10 Ch. D. 696; and now the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

(*n*) *Toulmin* v. *Steere*, 3 Mer. 210, notes to *Marsh* v. *Lee*, 1 W. & T. L. Ca. 678. And see *per* James, L.J., in *Adams* v. *Angell*, L. R. 5 Ch. D. 647.

(*o*) 3 Mer. 210.

(*p*) Sir W. Grant, M.R., 1817.

(*q*) *Adams* v. *Angell*, L. R. 5 Ch. D. 634.

Chap. VI.

always been held that the mere fact of a charge having been paid off, does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any. So, also, it is admitted, that if without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot, and protects him. The intention, therefore, if expressed, governs the case; but if no intention is expressed, then *Toulmin* v. *Steere* says, that the incumbrance which is paid off is merged, and the subsequent incumbrancers let in."

The facts in the latter case were as follows:—

After a decree in a foreclosure suit to which both the mortgagor and the first and second mortgagees were parties, the plaintiff, the first mortgagee, purchased the equity of redemption from the trustee in bankruptcy of the mortgagor, and by the deed of assignment, in consideration of £1,380 (the sum due on the first mortgage) retained by the first mortgagee, "in full satisfaction of his debt, and of £20 paid to the trustee" (making the purchase-money of £1,400), the trustee assigned the mortgaged property to the first mortgagee, "subject to the aforesaid claim" of the second mortgagee. The value of the mortgaged property did not exceed £1,380. The second mortgagee contended that the effect of this purchase was to extinguish the first mortgage debt, and to let in his own charge as a first incumbrance. A correspondence took place between the solicitors of the first mortgagee and the trustee at the time of the purchase. It was held by the Court of Appeal (affirming the decision of Hall, V.C.), that looking at the surrounding circumstances, the conveyance sufficiently expressed an intention to keep the first mortgage alive; and that *Toulmin* v. *Steere* did not apply.

It will appear, then, from the statement of Jessel, M.R., that notwithstanding the doctrine laid down by *Toulmin* v. *Steere*, a prior mortgage, if the intention to keep it on foot against the estate is duly expressed, may be used by the purchaser of the equity of redemption, as a protection against the intervening incumbrances (*r*). Two forms for keeping the mortgage on foot where the purchaser has paid off a mortgage debt out of the purchase-money are given by Mr. Davidson (*s*), exemplifying the cases referred to by Jessel, M.R.—the one being an assignment of the debt and conveyance of the freehold to a trustee for the purchaser, the other a mere declaration that it is intended to keep the mortgage alive.

Consolidation.

There is another doctrine relating to redemption, which may affect a purchaser or mortgagee (*t*) of an equity of redemption; that is, if the owner of different estates mortgage them to one person, separately for distinct debts, or successively to secure the same debt, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone, upon the principle that redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee and redeem him entirely: not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other (*u*). This is called the right of consolidation—the right to hold united securities on different estates until payment of the debts secured on each one. Therefore a second mortgagee, in addition to the risk of being squeezed out by tacking, is liable to the risk of being squeezed out by consolidation (*x*).

The right to consolidate arises not only in case of a suit for redemption, but also for foreclosure, and even in case of a sale under the power of sale in one of the mortgages (*y*), and whether the mortgage in respect whereof the right is claimed is legal or equitable (*z*).

It will be remembered that notice of mesne incumbrances is fatal to tacking; but it has been held that as regards the right of consolidation the notice of a mesne incumbrance is immaterial. Also the doctrine has been held to apply to a transferee of two

(*r*) *Marsh* v. *Lee*, 1 W. & T. 678.
(*s*) 2 Da. i. 326, 333.
(*t*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.
(*u*) Fisher, vol. ii. p. 630.
(*x*) See 2 Da. ii. 293, note.
(*y*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595.
(*z*) *Neve* v. *Pennell*, 2 Hem. & Mill. 170.

Chap. VI.

mortgages on different estates which had been again mortgaged, on the ground expressed by Knight-Bruce, L.J., that—

"The second incumbrancer must be deemed to have taken his security with knowledge that the two mortgages of the two estates, though then belonging to different mortgagees, might coalesce, and with knowledge of the possible consequences of their coalition" (*a*).

"There may," he adds, "be moral considerations of weight against this conclusion, but it is settled by authority."

But it has been recently decided that the doctrine does not apply to a case where one of the mortgages was created subsequently to the assignment of the equity of redemption to the person seeking to redeem (*b*). The doctrine is thus clearly and fully stated by Cotton, L.J. (*c*):—

"The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates the property of the same mortgagor, one of these cannot be redeemed without the other, and this is so whether the two mortgages were originally granted to the same mortgagee, or, having been originally vested in different persons, have by assignment become vested in the same person. This was on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates, unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord Hardwicke in the year 1750, as appears by the report of *Ex parte King*, though he afterwards recognised and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply, even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion, independently of authority, this contention cannot prevail. It seeks to affect in equity,

(*a*) *Vint* v. *Padget*, 2 De G. & J. 613.

(*b*) *Mills* v. *Jennings*, L. R. 13 Ch. D. 639, affirmed by H. of L., L. R. 6 Ap. Ca. 698, overruling *Tassell* v. *Smith*, 2 De G. & J. 713; and see *Harter* v. *Colman*, L. R. 19 Ch. D. 630.

(*c*) *Mills* v. *Jennings*, L. R. 13 Ch. D. 646.

and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate, as soon as the second mortgage is created, a right to get both the mortgages into his hands, and to hold both till the debt due on each is paid. The principle which allows, as against a subsequent purchaser or mortgagee, the right of consolidation is, that the mortgagor cannot, by any dealing with the equity of redemption, prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption, and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate, there can be no consolidation of a mortgage subsequently created on another estate."

Again, it has also been recently held, that the doctrine does not apply unless default has been made on all the securities in respect of which it is claimed (*d*). Cotton, L.J., says:—

"In order to enable the mortgagee to bring an action and to consolidate, there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back, and that cannot apply to a case where, as regards one of the securities, there has been no forfeiture at all, where the debt is not due, and where as regards that estate and that security—an independent security—steps could not be taken as against the owner of the equity of redemption to bring him into Court, and to call upon him to redeem or to be foreclosed. It cannot apply to a case where the stipulation is that certain monthly payments are to be made, and there has been no default,

(*d*) *Cummins* v. *Fletcher*, L. R. 14 Ch. D. 699.

Chap. VI.

and the contract goes on to say that if those payments are all made, then the estate shall revest, there having been no forfeiture so as to make the right of the owner of the estate subject to the security an equitable one only, not depending upon legal contract."

The mortgagee must, in like manner, be able to reconvey both properties—one property must not have ceased to exist (*e*).

By the above and other decisions, the application of the doctrine of consolidation has been considerably cut down; and now by the Conveyancing and Law of Property Act, 1881 (*f*), it is enacted that where the mortgages, or one of them, are or is made after the 31st December, 1881, a mortgagor (*g*) seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. But this enactment applies only if, and so far as, a contrary intention is not expressed in the mortgage deeds or one of them. So that in future, in respect of mortgages made after the commencement of the above Act—*i.e.*, 31st December, 1881, the right to consolidation can only arise under express contract.

Implied covenants for title.

In addition to the shortening of mortgage deeds effected by the Conveyancing and Law of Property Act, 1881, by making incident to the estate of the mortgagee a power of sale, and other powers hitherto usually inserted in the deed, as above pointed out, the covenants for title by the mortgagor may in future be omitted, the same Act causing them to be implied where the mortgagor conveys and is expressed to convey as beneficial owner (*h*). These are absolute covenants (*i*) that he has a right to convey, that the mortgagee shall have quiet enjoyment of the property after default (*k*), free from incumbrances, and for further or more perfectly assuring the subject-matter of conveyance. Not content with thus shortening mortgage deeds, the Legislature has further,

Statutory forms.

(*e*) *In re Raggett*, L. R. 16 Ch. D. 117.

(*f*) 44 & 45 Vict. c. 41, s. 17.

(*g*) 'Mortgagor' includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property (44 & 45 Vict. c. 41, s. 2, (vi.)).

(*h*) 44 & 45 Vict. c. 41, s. 7 (1) (c).

(*i*) That is to say, that, while in conveyances upon sales the covenants are restricted to the acts and omissions of the vendor, and the ancestors and testators through whom he claims, the covenants in mortgage deeds and securities for money are unrestricted, and amount to a warranty against and for the acts and omissions of the whole world (1 Da. p. 121).

(*k*) See *ante*, p. 176.

by the same Act (*l*), provided short forms of deeds of statutory mortgage, statutory transfer, and statutory reconveyance (*m*).

Reconveyance.

Upon the debt being satisfied, whether by payment after notice or after action upon the covenant in the deed to pay the debt, or whether by payment after hearing in an action for foreclosure, or before hearing under 7 Geo. II. c. 20, or in an action for redemption, or by payment into Court for discharge of incumbrances on a sale under the power above referred to given by the Conveyancing and Law of Property Act, 1881 (*n*), a mortgagor is entitled to have reconveyed to him, or as he may direct, the mortgaged property. The mortgagee hitherto has not been obliged to assign the mortgage debt to the mortgagor upon redemption; or to a purchaser, when the security is paid off out of the proceeds of a sale under a decree; nor has he hitherto been bound to convey to any other person as a mortgagee in his own place; being bound only to reconvey the estate to the owner of the equity of redemption (*o*). But now, by the Conveyancing and Law of Property Act, 1881 (*p*), a mortgagor entitled to redeem may, notwithstanding any stipulation to the contrary, require the mortgagee to assign the mortgage debt, and convey the mortgaged property to any third person as the mortgagor directs.

The extent and meaning of this provision was soon judicially explained. In an early case (*pp*), Jessel, M.R., said:—

"When we come to look at the section, it appears to me quite plain what the meaning of it is. We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a reconveyance on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a transfer of the mortgage security, but were not willing to take a security directly from the mortgagor, dreading intermediate incumbrances. At that time the debt was not transferable, so that a power of attorney was necessary; therefore, the old decisions were right in laying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a third person. Now the difficulty has been got rid of, by making the debt transferable at law, so that no power of attorney is required, and all ground of objection on the part of a mortgagee to transfer the security is taken away. It can do him no harm in any way.

"Then, what are the words of the 15th section of the Act of 1881? It says, "where a mortgagor is entitled to redeem." Every mortgagor

(*l*) 44 & 45 Vict. c. 41, ss. 26 to 29.
(*m*) See 3rd schedule.
(*n*) 44 & 45 Vict. c. 41, s. 5.
(*o*) *Dunstan* v. *Patterson*, 2 Ph. 341; and Fisher, vol. ii. p. 1065.
(*p*) 44 & 45 Vict. c. 41, s. 15.
(*pp*) *Teevan* v. *Smith*, L. R. 20 Ch. D. 728.

Chap. VI.

is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage he must also redeem all who are between that mortgagee and himself. A puisne mortgagee, indeed, is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself and the ultimate equity of redemption. So that the words, "where a mortgagor is entitled to redeem," really include every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words, "where a mortgagor is entitled to redeem," are inserted. They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then it says, "he shall have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person." It is only "instead of reconveying." The section assumes two things: First, that the mortgagee is bound to reconvey to the person applying to him; and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word "reconvey" is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee, he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition in the Act (*q*). He is an assign of the mortgagor, and is entitled to redeem. It appears to me that no person can avail himself of the 15th section who is not entitled to call for a reconveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a reconveyance."

Subsequently, the above right given to the mortgagor by the Act of 1881, has been extended by the Conveyancing Act, 1882 (*r*), so that it may be enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition to assign the debt and convey the property by an incumbrancer is to prevail over a requisition by the mortgagor, and as between incumbrancers a requisition is to have effect according to priority of incumbrance.

The above provisions do not apply in the case of a mortgagee being or having been in possession; for, it is said, he is liable to

(*q*) S. 2.

(*r*) 45 & 46 Vict. c. 39, s. 12.

account, and the mortgagor cannot release his liability to mesne incumbrancers (*s*).

In case repayment of the debt was made after the death of the mortgagee, it was necessary that the property mortgaged should be reconveyed by the devisee where the mortgagee had by his will devised his mortgage estates, otherwise by his heir. But as expense and inconvenience not unfrequently arose from the heir being unable by reason of infancy or otherwise, or unwilling to convey, or not ascertainable (*t*), a partial remedy was applied by the Vendor and Purchaser Act, 1874 (*u*), which empowered the legal personal representative of the mortgagee, on payment of all sums secured by the mortgage, to convey the mortgaged estate. This section, in cases of death after the 31st December, 1881, is repealed by the Conveyancing and Law of Property Act, 1881 (*x*); but such repeal is not to affect the validity or invalidity, or any operation, effect, or consequence of any instrument executed or made, or of any thing done or suffered before the 31st December, 1881 (*y*). By that Act (*z*), on the death of the mortgagee, notwithstanding any testamentary disposition, the estate is made to vest in his personal representatives or representative from time to time in like manner as if it were a chattel real. The result is, that for the future a mortgagee's estate must go to his personal representatives or representative, and if he wishes it to go to a particular person, that can only be by appointing him an executor for that special purpose (*a*). Nor is the operation of this enactment confined, as was the former one, to the case of payment of all sums secured (*b*), but applies as well to the transfer of a mortgage as to its redemption.

III. Estates by Statute Merchant and Statute Staple.

In Blackstone's Commentaries (*c*) are further cited, as examples of estates on condition, estates by Statute Merchant and Statute Staple. They were securities by traders for a debt, and were the acknowledgment of its existence before a chief magistrate of some particular trading town, and under this acknowledgment the lands of the debtor were delivered to the creditor to hold until satisfaction of the debt out of the rents; the one was entered into pur-

(*s*) 44 & 45 Vict. c. 41, s. 15 (2). See note by Wolstenholme & Turner, p. 49.
(*t*) 2 Da. pt. ii. p. 37.
(*u*) 37 & 38 Vict. c. 78, s. 4.
(*x*) 44 & 45 Vict. c. 41, s. 30.
(*y*) S. 71 (2).
(*z*) S. 30.
(*a*) Wolstenholme & Turner, p. 72.
(*b*) See *In re Spradbury's Mortgage*, L. R. 14 Ch. D. p. 514.
(*c*) Vol. ii. 160.

Chap. VI.

suant to the statute 13 Edw. I. *De Mercatoribus*, the other to 27 Edw. III. c. 9, before the mayor of the staple. A similar security was a recognisance in the nature of statute staple, which applied to all the King's subjects, by virtue of 23 Hen. VIII. c. 6. All have, however, long become obsolete.

Estate by *elegit*.

The estate by *elegit* is of the same nature, arising, it will be remembered (*cc*), where a creditor, having recovered a judgment against his debtor, the lands of the debtor were delivered by the sheriff, under a writ of *elegit*, in execution to the judgment creditor to hold till, out of the rents and profits thereof, the debts were levied, or the debtor's interest expired (*d*). Under the Statute of Westminster the Second (*e*) the creditor was entitled to seize under the writ a moiety of the debtor's lands, and the statute 1 & 2 Vict. c. 110, extended the right of seizure from a moiety to the whole.

By the statute of Edward it was provided that when a debt is recovered or acknowledged in the King's Court or damages awarded, it shall be thenceforth in the election of him that sueth for such debt or damages to have a writ of *fieri facias* unto the sheriff of the lands and goods, or that the sheriff deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one-half of his land, until the debt be levied according to a reasonable price or extent (*f*). Under this writ the estate is conditional, being defeasible as soon as the debt is paid or the debtor's interest ceases (*g*).

(*cc*) *Ante*, p. 103.
(*d*) 3 St. Bl. 599.
(*e*) 13 Ed. I. c. 18.
(*f*) Wms. 84.
(*g*) A form of writ of *elegit* is given in Appendix (F) to the schedule to Judicature Act, 1875.

CHAPTER VII.

ESTATES IN POSSESSION.—ESTATES IN EXPECTANCY.

HAVING exhausted the different classes of estates of freeholds so far as regards the duration of interest in them, that is to say, whether for life, in tail, or in fee; having pointed out the distinction between freehold estates and those less than freehold, and between estates conditional and absolute; we now proceed to the investigation of another leading classification of ownership which is presented in reference to the time of enjoyment. In this view estates may be considered as divided into the twofold classification of Estates in Possession and Estates in Expectancy.

An Estate in Possession is one conferring an immediate right to a present enjoyment. An Estate in Expectancy is one to take effect only at a future period.

I. Estates in possession.

An Estate in Possession requires little comment; it almost explains itself. If one, being himself the owner in possession of an estate, conveys to another either that estate, or any estate immediately carved out of it and taking effect contemporaneously with the conveyance, the grantee obviously acquires an estate in possession. Thus, if A., being an owner in fee simple, grants his estate to B., or merely out of his fee grants an estate to B. for his life, B. acquires an estate in possession in fee in the one case, or for life in the other. So, were he by his will to do the like, there being no intermediate gift to any other party, B., upon the death of the testator, would acquire an estate in possession.

Possession, it will be observed, when put in contrast to expectancy, comprehends not merely the actual and bodily occupation or enjoyment of the property, but a right to have it. In this sense the estate itself would be one in possession, though the party entitled to that possession were, in fact, kept out of it, —'disseised,' that is to say, or 'ousted' of it. In very strictness, indeed, he might, under such circumstances, more properly be described as having no estate at all, but simply a right of entry on the lands; in other words, a right to recover their possession. Still, viewed in opposition to an estate in expectancy, his interest at all events would be referred to as one in possession.

Chap. VII.

II. Estates in expectancy.

Estates in Expectancy fall under one or other of the three classifications of—(1) estates in Reversion; (2) estates in Remainder; or (3) estates by way of Executory Devise.

a. Estates in reversion. Particular estate.

An estate in Reversion is that portion of the estate or ownership which, a partial interest having been created by an owner out of his estate, not exhaustive of his whole ownership, is left, as a residue undealt with, in himself; for instance, where a tenant in fee simple grants to another an estate for years, or for life, or in tail. That residue, the portion of the estate not dealt with, is a 'reversion.' The part carved out of the larger ownership is called a 'particular' estate, from the Latin word *particula*, the estate being a part only of the whole ownership; and the estate left in the grantor is called a reversion, because, on the termination of the particular estate, the ownership reverts in possession to him.

A reversion arises from the interest in question not having been dealt with, while the anterior portion of an estate was being carved out of it. As where A., the owner, granting to B. for his life, omits to deal with the portion of the estate not exhausted by B.'s life interest; it naturally remains in the donor, and on the death of B. the whole estate will revert to the donor.

The expectant interest, or reversion, is vested in him who was before the owner of the whole, *ipso facto* and without any special reservation for the purpose. This reversion is an estate in expectancy only, and not in possession, because the reversioner has no right to the possession until the particular estate is determined.

Particular estate. —One of freehold. —A chattel interest.

A distinction should be noticed, in reference to seisin and its effect, between the case in which the intermediate or particular estate is one of freehold and that in which it is merely a chattel one. Where the particular estate is a freehold estate, whether for life or in tail, the interest in reversion is a future estate in every sense of the word. The intermediate interest being freehold, there is an actual seisin or estate in possession in its holder; and as there cannot be two concurrent estates in possession in two different parties, the ulterior estate, that which is to take effect only on the termination of the prior one, is necessarily of a reversionary character only. Where, however, the intermediate interest is a chattel one, that is, a term for years only, though the ulterior or remote interest is reversionary, inasmuch as the actual right to the possession is postponed,—still, in point of seisin and actual estate, as

regards all others than the termor, and so far possession, it remains in the grantor. When the nature of a chattel interest is remembered, it will be obvious that the legal seisin has never been parted with, and, subject to the lease, may be transmitted by the owner to another as an estate in possession, the termor being regarded merely in the light of a bailiff of the owner. Thus, to take the ordinary case of a lease at a rack rent, the landlord having demised for the term of the lease, the right to the actual possession of the lands is no doubt postponed to the expiration of the lease, and the interest of the lessor is so far a reversionary one. But, letting at a rent, the right to this rent becomes annexed to the possession of the reversion, and is a fruit of the letting which the landlord is reaping throughout the whole period of the tenancy. The lease is in fact but the means by which the land is rendered productive to its owner.

Dower and curtesy.

The effect of this may be seen in reference to dower and the alienation of such reversion. Where the particular estate was a term of years, the owner of the reversion remained seised of an estate of inheritance at law; and, therefore, if a man, his wife was dowable thereout and still is; and similarly, if a woman, her husband will become tenant by curtesy (*a*).

Alienation.

So also, with the consent of the tenant for years, the reversion could be conveyed by feoffment (*b*), which derives its efficacy from the formal livery of seisin by the feoffor to the feoffee; but such form of conveyance is now only used as a conveyance by infants under the custom of gavelkind; though, until the passing of the Act to Amend the Law of Real Property (*c*), it was used as a conveyance by a corporation (*d*). On the other hand, where the particular estate was a freehold, the seisin being in the owner of the particular estate, the reversion was strictly an incorporeal hereditament; and, therefore, conveyance by grant alone could be made. This difference is not now, for practical purposes, very material; for, it will be remembered, that Act provides that also all corporeal tenements and hereditaments shall, as regards the immediate freehold thereof, be deemed to lie in grant as well as in livery (*e*).

Merger.

Estates in possession and estates in reversion can exist only as

(*a*) Co. Litt. 29*b*, 32*a*, ed. by Thomas, vol. i. 560, 581; and 2 Bl. 127.

(*b*) Co. Litt. 49*a*, ed. by Thomas, vol. i. 353.

(*c*) 8 & 9 Vict. c. 106, s. 2.

(*d*) A form is given of a feoffment by an infant in 2 Da. i. 244.

(*e*) *Ante*, p. 86.

Chap. VII.

separate estates, so long as their ownership is distinct. As respects all other estates than an estate tail, the union of the reversionary estate with that in possession creates what has been already referred to (*f*) as a merger, and the latter becomes extinguished in the former. Thus, suppose the interest in possession, whether for a term of years or for life, to have been granted to one, and that individual were subsequently to succeed to the reversion, the larger ownership of the reversion would swallow up the smaller intermediate interest, which would accordingly become annihilated. For example, if the owner of an estate in fee simple were to grant an estate to his son for his life, leaving the reversion in himself, and then to die intestate, and the reversion to descend upon the son, the estate for life would merge in the reversion. So were one, being lessee for a term of years, to acquire the fee under a testamentary devise of it, the term would merge in the freehold. One qualification only in the ownership would prevent this result; and that is, the present interest and the reversionary one being held in different interests. Thus, in the case of the term, were it to belong to the termor in his character of executor of its original possessor, while the fee was devised to him in his own right, there would be no merger.

This merger is then confined to the cases in which the intermediate estate is one held either for life or for years. In the case of an entail in one with a reversion in fee expectant on its termination no merger takes place; estates tail being protected from merger by the construction which has been put on the Statute *De Donis*, in its enactment that the will of the donor was to be fulfilled, which it was assumed it could not be if the entail were thus destroyed. Says Blackstone (*g*) :—

"Estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the Statute *De Donis:* which operation and construction have probably arisen upon this consideration; that, in the common cases of merger of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it: and now can only do it by certain special modes, by a fine, a recovery, and the like:

(*f*) *Ante*, p. 147.

(*g*) Vol. ii. 177.

it would, therefore, have been strangely improvident, to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee."

Incidents. Fealty. Rent.

From ancient times two incidents have been considered as annexed to a reversion,—'fealty,' and, when reserved, rent called a 'rent service.' The former has now become obsolete (*h*); but the latter usually exists; and whenever rent is reserved to the reversioner on the granting of a particular estate, the right to the rent, unless specially excepted, passes with a grant of the reversion itself. Thus, suppose A. to be the reversioner of an estate out of which a lease had been granted, and his reversion the next estate to the lease itself; were he to grant over to another the reversion, the right to the rent would pass, with the estate itself, to the grantee. It is called 'rent service,' as it is the service rendered by the tenant to his lord; though usually it consists of money, it need not necessarily do so, and sometimes it is expressed to be a peppercorn merely (*k*).

At common law a rent service did not require to be reserved by deed (*l*); but now (as we have seen) a lease required by law to be in writing will be void if not by deed. By the Statute of Frauds (*m*) a lease must be in writing, except where it does not exceed three years and a rent of at least two-thirds of the full value is reserved.

Though rent be incident to the reversion when existing, its creation is not a condition to the creation of the reversion itself. Thus, I may grant to one for years, for life, or in tail, without any reservation of rent at all. The estate would be good, and the reversionary interest as much preserved as though rent had been reserved. Says Lord Coke (*n*):—

"It is to be understood that in the case of the gift in tail, lease for life or years, the fealty is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service. But the rent he may except; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in tail without any reservation, the donee shall hold of the donor by the same services that he held over.

(*h*) *Ante*, p. 35.
(*k*) 2 Bl. 41.
(*l*) Litt. s. 214, ed. by Thomas, vol. i. 443.
(*m*) 29 Car. II. c. 3. *Ante*, p. 144.
(*n*) 1 Co. Litt. 143*a*, ed. by Thomas, vol. i. 445.

Chap. VII.

But otherwise it is of an estate for life or years; for there, if he reserveth nothing, he shall have fealty only, which is an incident inseparable to the reversion, as hath been said."

Attornment.

At one period of the common law, in the case in which the estate was in lease, no grant could be made of the reversion carrying with it the right to the rent, without the consent of the tenant, expressed by what was called 'attornment' to his new landlord. It was conceived unreasonable to impose a new landlord upon the tenant without his concurrence. Such at least was the case when the grant was an assurance of the ordinary character; though it would have been otherwise had the interest been effected by a fine, which being treated as a judicial assurance, superseded the occasion for attornment. A statute of the reign of Queen Anne abolished the necessity for attornment (*o*); and by 11 Geo. II. c. 19, s. 11, any attornment made by tenants without their landlord's consent to strangers, claiming title to the estate of their landlords, is made null and void.

Distress.

Rent service issues out of the whole estate, in other words, every portion of the property is liable to it; and for recovery of all rent service, there exists at common law the remedy called 'distress,' which is a right of seizure and sale of the goods of the tenant found on any part of the premises. By 34 & 35 Vict. c. 79, the goods of lodgers are protected (*oo*).

Condition of re-entry.

Under ordinary leases, in addition to the remedy by distress, there is (as we have seen in a previous chapter) (*p*), usually added a condition of re-entry on non-payment of the rent, and consequent avoidance of the lease.

In ancient times conditions of re-entry, it will be remembered, were not assignable (*q*). They were treated as personal only to the landlord and his heirs. A statute of Henry VIII. (*r*), however, in the case of leases by deed (*s*), made them transferable. The Wills Act (*t*) enabled rights of entry for conditions broken to be disposed of by will, and the Act to Amend the Law of Real Property (*u*) enabled all rights of entry to be disposed of by deed. And now by the Conveyancing and Law of Property Act, 1881 (*x*),

(*o*) 4 Anne, c. 16. *Ante*, p. 150.
(*oo*) See *Phillips* v. *Henson*, L. R. 3 C. P. D. 26.
(*p*) *Ante*, chap. v. p. 157.
(*q*) *Ante*, chap. vi. p. 170.
(*r*) 32 Hen. VIII. c. 34.
(*s*) *Standen* v. *Christmas*, 10 Q. B. 135. *Ante*, p. 170.
(*t*) 1 Vict. c. 26, s. 3.
(*u*) 8 & 9 Vict. c. 106, s. 6.
(*x*) 44 & 45 Vict. c. 41, s. 10.

every condition of re-entry and other condition contained in a lease made after 1881, is to go with the reversion immediately expectant on the term granted by the lease, and may be taken advantage of by the person entitled, subject to the term, to the land leased.

The assignee of the reversion at common law had a right to distrain for rent, because the rent was incident to the reversion; although he had no right to avail himself of conditions of entry (*y*).

Destruction.

Formerly, if the reversion to which rent was incident became destroyed, the rent itself was extinguished, and could not be recovered. Thus, suppose A., having himself only a lease or term for years, were to let to B. for a term less than his own, reserving rent, and then the reversion on his own lease,—say, for example, the fee were to devolve on himself (it might be by testamentary disposition from the owner); A.'s term would have merged in the fee and become destroyed. But it was to that term only that the rent payable by B. was incident. Consequently, A.'s estate having gone, the incident would perish with that to which it was annexed; and that notwithstanding A. remained the owner, his estate being enlarged. Being enlarged, however, the reversionary estate would not be the same, not that to which the rent was incident; and so the rent would have been lost. This was remedied some time back in the cases of leases surrendered for the purpose of renewal, by a statute of the reign of 4 Geo. II. c. 28. Thereby the owners of the new (renewed) lease were invested with the same right to the rent of undertenants, and the same remedy for its recovery, as if the original leases had been kept on foot. And the Act to Amend the Law of Real Property (*a*) has extended the same remedy to other cases of merger or surrender.

b. Estates in remainder.

How differing from reversions.

An estate in Remainder has a general resemblance to an estate in reversion; of the distinctions between them, the two more prominent are—1st, that whereas an estate in reversion arises in the absence of specific limitation, an estate in remainder is the subject of a direct creation; and, 2ndly, that as between the owner of the particular estate and the remainderman no tenure exists, as we have seen does exist between the owner of the particular estate and the reversioner.

(*y*) *Scaltock* v. *Harston*, L. R. 1 C. P. D. 106; see *per* Archibald, J., p. 109; and *ante*, p. 150.

(*a*) 8 & 9 Vict. c. 106, s. 9.

Chap. VII.

(1.) Subject of direct creation.

(1.) An estate in Remainder is defined by Blackstone (*b*) to be—

"An estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee simple granted lands to A. for twenty years, and after the determination of the said term, then to B. and his heirs for ever: here A. is tenant for years, remainder to B. in fee. In the first place an estate for years is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. They are, indeed, different parts, but they constitute only one whole: they are carved out of one and the same inheritance: they are both created, and may both subsist together; the one in possession, the other in expectancy. So if land be granted to A. for twenty years, and after the determination of the said term, to B. for life; and, after the determination of B.'s estate for life, it be limited to C. and his heirs for ever: this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions: there is, first, A.'s estate for years carved out of it: and after that, B.'s estate for life, and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing; upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence, also, it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple: because a fee simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate: a remainder, therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee simple; as £40 is part of £100, and £60 is the remainder of it: wherefore, after a fee simple once vested, there can no more be a remainder limited thereon than after the whole £100 is appropriated, there can be any residue subsisting."

Right to enter immediately on cesser of prior interest.

In all the above circumstances in which a series of estates is created one after another, each succeeding estate in the series has naturally to wait for the determination of the one preceding it before it can be enjoyed by its owner. The moment, however, that the prior estate ceases to exist, the right to enter on the enjoyment devolves on whosoever is entitled to the succeeding estate, and that from whatever cause the cesser or determination takes place. Thus, let there be an estate to A. for his life with remainder to B. in fee. Were A. to commit a forfeiture of his estate, B. would have an immediate right of entry. The estate

(*b*) Vol. ii. 164.

having gone, his possession would not have to be postponed until A.'s death. Indeed, in the instance of successive grants for life to different individuals, as, for instance, to A. for life, remainder, or as it is usually expressed 'after his death,' to B. for life, and after his death to C. for life, and so forth; though the remainders to B. and C. and the rest of the series were all for life, and all the lives would naturally be wearing out together, yet, nevertheless, B., C., and the rest would equally have successive estates in remainder, expectant as to all of them on the determination of A.'s life estate, as to C. on A.'s and that of B., and as to the rest on all the preceding ones. The fee simple expectant on the last of the life estates might of course be granted in like manner as a remainder, or might remain with the grantor as the reversion.

Rule in Shelley's Case.

But not only may there be distinct estates carved out of the same ownership in favor of particular individuals, but the same individual may be possessed of two different estates in the same line of ownership.

Thus, says Mr. J. Williams (*d*):—

"It is possible that one person may have, under certain circumstances, more than one estate in the same land at the same time, one of his estates being in possession, and the other in remainder, or perhaps all of them being remainders. The limitation of a remainder in tail, or in fee simple to a person who has already an estate of freehold, as for life, is governed by a rule of law, known by the name of the rule in *Shelley's Case*, so called from a celebrated case in Lord Coke's time, in which the subject was much discussed, although the rule itself is of very ancient date."

The rule in *Shelley's Case* (*e*) is of a very technical character. There the limitations were to Edward Shelley for life; and after his decease to Mr. Caril and others for twenty-four years; and after the said twenty-four years ended, then to the heirs male of the body of the said Edward Shelley, and of the heirs male of the body of such heirs male; and for default of such issue over. Edward Shelley died leaving a younger son, Richard. His elder son had shortly predeceased him, leaving his wife surviving *enceinte* of a son, afterwards born and named Henry. On the death of Edward, the younger son, Richard, entered; again, later, Henry entered and ejected Richard. Richard brought an action of

(*d*) R. P. 251.

(*e*) *Temp.* 23 Eliz., 1 Co.'s Rep. 93*b*; see Tudor's Leading Cases on Real Property, 589.

Chap. VII.

ejectment against Henry, apparently on the ground that he was heir male of the body of Edward Shelley at the time of his death, and therefore the fee having been limited in remainder to such heir male, he was entitled. To this it was answered for Henry (*f*), that it is a rule in law, when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either immediately or mediately (as in the present case—viz., after the term of twenty-four years to Caril and others), to his heirs in fee or in tail (as in the present case), that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase—that is to say, the heir takes by descent and not as purchaser; and therefore Henry, as heir male by descent, was entitled to succeed. It will be remembered that purchase is defined to be "possession of lands unto which a man cometh not by title of descent" (*g*). And the contention for the defendant Henry prevailed.

Instances of application of rule—its effect.

An instance of the application of the rule in *Shelley's Case* is to be found in the old method of barring a widow's dower in her husband's freeholds (*h*). It will be remembered, that for her right to dower to have arisen, it was necessary that her husband should have been seised of the lands for an estate of inheritance, that is, fee simple or fee tail, in possession. To prevent his taking such estate in lands conveyed to him, by the conveyance a power of appointment was given to him over the lands; and, in default of or until such power was exercised, a life estate only was vested in him, with a remainder, in case such life estate became forfeited or otherwise determined, to a trustee for him and his heirs for the rest of his life; with a remainder to his heirs, or, which is the same thing, to him and his heirs. He thus took an estate for life in possession, with a remainder in fee expectant on his own decease—that is, he took the whole fee simple subject only to the trustee's estate; but that just prevented the fee simple being an estate in possession during his life: and therefore it was not subject to dower; at the same time he retained power of disposition over the whole. It comes then to this, that the effect of the rule is, that whenever under the same instrument, a limitation having been made of an estate of freehold to one, *e.g.*, for life or in tail, there is also found another to his heirs, and that even

---

(*f*) Co.'s Rep. 104. *Ante*, p. 130.
(*g*) 2 Co. Litt., ed. by Thomas, 184. (*h*) See Wms. 301.

after an interposed estate between the limitation to himself and the gift to the heirs, the reference to the heirs must be taken, not as conferring a personal interest on the heirs, but as extending the interest of their ancestor, and enlarging that which would have been otherwise—*e.g.*, an estate for life or in tail only—into one in fee. Thus, suppose a limitation to A. for his life, with remainder to B. for his life, with remainder to the heirs of A., the gift would be construed not one by way of remainder to the heirs of A., but an estate in fee in A. himself, subject only to an intermediate estate in B. Or, suppose a limitation to A. for his life, with remainder to B. and the heirs of his body, and in default of such issue to the heirs of A.: A. will have an estate in fee simple in remainder expectant on the intermediate estate tail in B.

(2.) Non-existence of tenure.

(2.) To pass to the second distinction, that of the non-existence of tenure. In the case of a reversion, the owner of a particular estate (as we have seen) originally owed fealty, and may still have to render rent to the reversioner (*a*); his estate accordingly is described as held of the reversioner. In the case of the remainder, however, no such tenure exists. Suppose an estate limited to A. for his life, with remainder to B. in fee, A. does not hold of B. any more than B. of A. Both A. and B. derive their estates from the same source: viz., the grant of the former owner in fee simple, to whose ownership they have succeeded; and the one has no more right to be lord than the other. While subinfeudation subsisted, all estates, as we have seen, were held of some person; and since its abolition the theory of such holding is so far continued in that, the power of tracing a mesne lord having been lost by lapse of time, all the estates in the kingdom are held of the Crown as lord paramount (*b*). In the case, accordingly, of every grant of a particular estate, with remainder over in fee simple, the two estates constitute but one ownership or seisin, though apportioned out between different individuals, and both are, in legal theory, held of the chief lord.

Means of creating freehold estate *in futuro*.

The effect of the remainder being an estate created by the act of the grantor in someone else, and there existing no tenure between the owner of the particular estate and the remainderman, unlike the reversion—which estate remains in the grantor and arises of itself, being, as it is said, the creation of the law—will

(*a*) *Ante*, p. 205.

(*b*) *Ante*, p. 34.

Chap. VII.

now be seen. Two principles were prominent in the feudal system, and the law of property originating in and administered under it—first, that the tenancy should never be vacant, or, in other words, should be always, as it was termed, 'full,' in order that there might be ever present a party to render the feudal services; and secondly, that the creation of a freehold interest could only be effected by the open transfer of the property—its public delivery of possession, or as it was termed 'livery of seisin.' It followed from these two doctrines together, that down to the period at which, we shall hereafter see, a new principle was furnished by the introduction of Uses, no further estate could be limited at common law than that which was created by way of remainder upon an antecedent particular one. By any attempt to grant to another a freehold estate to take effect at a future period, with no intermediate limitation of the ownership, both these principles would have been impugned. The estate being intended to take effect only *in futuro*, there would have been no one intermediately to discharge the feudal obligations, and there could not be a present delivery of possession. But what could not be effected in the form of simple grant might be accomplished by the creation of a prior particular estate, and the superaddition to it of an estate which, though future, was to take effect by way of remainder on the termination of the particular estate; provided only that the particular estate were one of which there was actual delivery of possession, as in a lease for years, or where accompanied with livery of seisin, as in an estate of freehold. The particular estate carried with it the immediate possession, with the corresponding fulness of the tenancy, and the remainder taking effect on its expiration, the particular estate played the part of a prop or support, on which it was said the remainder might lean.

Thus, Blackstone says (*i*) :—

"Future estates can only be made of chattel interests which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that no estate of freehold can be created to commence *in futuro*; but it ought to take effect presently, either in possession or remainder: because at common law no freehold in lands could pass without livery of seisin; which must operate

(*i*) Vol. ii. 165.

either immediately, or not at all. It would, therefore, be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs for ever from the end of three years next ensuing is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here, by the livery, the freehold is immediately created, and vested in B. during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must, indeed, be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*; though to be occupied and enjoyed *in futuro*."

Dower and curtesy.

Attornment.

It should be added that, as in the case of reversions, so a remainder, if expectant on any estate for years, will be subject to dower and curtesy. Also before the statute (*k*), upon the alienation of a remainder, the attornment of the particular tenant was as necessary as upon the alienation of the reversion, and that although there was not between the particular tenant and the remainderman any feudal tenure. For this the following reasons have been given (*l*): 1st, that the remainderman came in by the feudal feoffment, and therefore the remainder would not pass without the utmost notoriety; and this was by attornment *coram paribus*, to which such notoriety was attributed, that the feudal feoffment could not be altered without it; 2nd, because the action of waste, and the right of forfeiture of tenant for life, accrued to him in remainder, and therefore the tenant for life, being to some purposes attendant on the remainderman, it was fit that he should attorn to his grant. And generally the union of the estate in remainder with the particular estate will produce merger in the same cases as if it were a reversion.

Merger.

Production of holder of particular estate.

The statute 6 Anne, c. 18 (*m*), applies equally to those having estates in reversion and in remainder expectant on the death of others. That statute enables such persons, on affidavit stating

(*k*) 4 Anne, c. 16. *Ante*, p. 206.

(*l*) Gilbert on Tenures, 90.

(*m*) See *ante*, p. 45.

Chap. VII.

belief that the *cestui que vie*—*i.e.*, the party for whose life the estate is holden—is dead, to obtain an order from the Lord Chancellor for the production of the *cestui que vie* if living, and if not produced he is to be accounted dead; and any one continuing to hold possession without the consent of the reversioner, or remainderman, as the case may be, shall be adjudged a trespasser, and may be proceeded against accordingly (*n*).

Remainders have been divided into the two classes of Vested and Contingent.

(*x*) Vested remainder.

A Vested Remainder is one which is necessarily capable of taking effect whenever the particular estate on which it is dependent comes to a termination. Thus, suppose an estate limited to A. for his life with remainder to B. and his heirs; the limitation to B. and his heirs, being affected by no contingency inherent in itself, must necessarily come into operation whenever the estate of A. ends. The uncertainty affecting the period of the termination of A.'s estate has no effect beyond. Let A. only die, or his estate otherwise determine, for example, by forfeiture, B.'s estate comes into operation. And this would be so even were the remainder not one to B. in fee, but limited only to him for his life. For though it was possible that B. might die before A., and B. accordingly never come into the actual enjoyment of the estate, still there would be an assured capacity on the part of B. to take if A.'s estate fell in earlier; and the law would not regard the uncertainty, whether he might be alive to take the benefit of the gift or not, as affecting the question of the remainder itself being vested.

(*y*) Contingent remainder.

A Contingent Remainder, on the other hand, is one where, from some uncertainty affecting itself, either in respect of the person designed to take under the limitation, or of some event made conditional to its arising, the remainder is itself in a position of contingency. The estate is said to commence at a future time in interest as well as in possession. Thus, as regards uncertainty of person, the limitation may be to one not in existence (*in esse*, as it is called), or not ascertained; or, as regards uncertainty of event, the event itself may not happen at all, or it may not happen until after the particular estate has itself determined. It

(*n*) See recent cases, *In re Owen*, L. R. 10 Ch. D. 166; and *In re Hall*, W. N. (1881), p. 59.

is a rule, as we have seen, affecting every remainder, that it must take effect on the determination of the particular estate. It follows that if any uncertainty exist either as to the person to take, or the event upon which the taking is to arise, the remainder itself must be a contingent one, and was in ancient times invalid (*nn*). It seems to have been first determined that if land be leased to A. for life, with remainder to the right heirs of J. S., the remainder was good, provided that J. S. was alive at the time of granting the lease (*o*).

First recognition.

By 10 & 11 Wm. III. c. 16, posthumous children are enabled to take estates as if born in their father's lifetime, where the estate is by marriage or other settlement. It had been so held where it was under a will in the House of Lords (*p*). Further, by the Inheritance Act (*q*), it is enacted:—

> S. 4. "That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the 31st day of December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect contained in a will of any testator who shall depart this life after the 31st day of December, 1833, then, and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

Illustrations.

The following are illustrations of each contingency above referred to.

The first kind, or those limited to an uncertain person, may be exemplified by a limitation to A. for life with remainder to the first son of B., who has then no son born, for here the person is not *in esse;* or to A. and B. for their joint lives with remainder to the survivor in fee, for here the person is not ascertained. The second kind, or those limited on an uncertain event, may be exemplified by a lease to A. for life with remainder to B. for life, and if B. should die before A., then the remainder to C. for life; for B.'s dying before A. is an event which may never happen, and therefore the remainder to C. is contingent; or, as another

---

(*nn*) For the learning as to the first recognition of contingent remainders as legal estates, see Wms. p. 261 *et seq.*

(*o*) It should be observed that a gift to the heirs of a man is sufficient to confer a fee simple on the heir, without further limitation to his heirs (2 Jarman on Wills, p. 61).

(*p*) *Reeve* v. *Long*, 1 Salk. 228. *Ante*, p. 129.

(*q*) 3 & 4 Wm. IV. c. 106, s. 4.

Chap. VII.

instance, by a lease to A. for life, and after the death of B., the lands to remain to another in fee; for though it is certain that B. must die, his death may not happen until after A.'s life estate shall be determined.

Contingency with double aspect.

It follows from the very nature of the case that if all the fractional interests carved out of an estate exhaust the estate, no ulterior limitation can be superadded. It is obvious, therefore, that one estate in fee simple cannot be limited by way of remainder on another, nor, indeed, after a fee simple can any remainder at all be limited. This, however, does not prevent the alternative limitations of two interests even in fee. Thus an estate may be given to A. for his life, and, if he have a son, to that son in fee, or, if he have no son, to a daughter in fee; the one limitation would not be a remainder, but substitutionary only for the other, and limitations of this nature are described as contingencies 'with a double aspect' (*s*).

Contingent remainder becomes vested.

A remainder, contingent in its original limitation, may change its character and become a vested one by the circumstances. Thus, in the instance of an estate to A. for his life, with remainder to the first son whom B. may have, B. having none at the time, so long as B. has no son born, the remainder is contingent; but let there be a son born, it becomes vested. The happening of the event which constitutes the contingency of a remainder will convert the remainder into a vested one.

Two rules for creation.

Out of the feudal doctrines to which we have referred—that the tenancy must never be vacant, and that to the conveyance of a freehold there must be an immediate livery of seisin (*ss*)—was evolved the rule that every contingent remainder of an estate of freehold must have a particular estate of freehold to support it. It could not be limited to take effect after a term of years, or at some future time other than the determination of the particular estate; for in such cases there would be a time during which the seisin, or feudal possession, would be without an owner, as it must *ex necessitate* pass out of the grantor on the creation of the remainder (*t*). Out of this rule arises another, or its corollary—that every contingent remainder must vest, that is, become an actual estate, either during the continuance of the particular estate, or *eo instanti* that it determines.

(*s*) *Loddington* v. *Kime*, 1 Salk. 224; Fearne's Contingent Remainders, 373.

(*ss*) *Ante*, p. 212.

(*t*) Fearne's C. R. 281, 307.

Thus, says Mr. J. Williams (*u*) :—

"Suppose lands to be given to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-four years. As a contingent remainder, the estate to the son is well created; for the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal possession, by reason of the estate in remainder which vested in him the moment he attained that age. In this case the contingent remainder has vested during the continuance of the particular estate. But if there should be no son, or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether. For the feudal possession will then, immediately on the father's decease, revert, for want of another owner, to the person who made the gift in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance."

Destruction

Every remainder, then, requiring a particular estate for its support, it followed that, if before the contingency had happened the particular estate had ceased to exist, the remainder must have failed. Thus, had the particular estate come to an end, and the person to take in remainder not come into existence, or had the particular estate been forfeited, surrendered, or merged, the remainder, which had to lean on the particular estate for its support, would have failed too; accordingly, down to a very modern period in the law, all remainders of the contingent class, as regards forfeiture, surrender, or merger, were very much at the mercy of the owner of the particular estate. A remedy, however, was provided for this by the Act to Amend the Law of Real Property (*uu*), which enacted that:—

> S. 8. "A contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this Act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened."

But although by that statute contingent remainders were protected against the destruction of the preceding particular estate, they were "still left," as James, L.J., expressed it, "to die with the death of such estate through an inherent defect in their original constitution"—that is to say, where there had been

(*u*) R. P. 269.

(*uu*) 8 & 9 Vict. c. 106.

Chap. VII.

no preceding freehold estate created on which the contingent remainder could lean. An instance occurred of this recently (*x*), which we will go more fully into in the chapter on Uses and Trusts. In consequence of that case, the statute 40 & 41 Vict. c. 33, was passed, consideration of which must also be reserved for the chapter on Uses and Trusts. Says Mr. J. Williams (*y*):—

Trustees to preserve contingent remainders.

"The disastrous consequences which would have resulted from the destruction of the contingent remainder—*e.g.*, where lands had been given to A., a bachelor, for life, and after his death to his eldest son and the heirs of his body, and in default of such issue, to B. and his heirs—were obviated in practice by means of the interposition of a vested estate between the estates of A. and B. We have seen that an estate for life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require, but should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported. And, so long as their estate continued, it is evident that there existed, prior to the birth of any son, three vested estates in the land; viz., the estate of A., the tenant for life, the estate in remainder of the trustees during his life, and the estate in fee simple in remainder, belonging, in the case we have supposed, to B. and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming into possession, so long as the estate of the trustees endured, that is, if they were faithful to their trust so long as A. lived. Provision was thus made for the keeping up of the feudal possession until a son was born to take it; and the destruction of the contingent remainder in his favor was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there will be no occasion for trustees to preserve them" (*z*).

Alienation.

Contingent remainders, so long as they remained in contingency, were formerly regarded as mere possibilities of succession; and, not carrying with them an interest equivalent to what

(*x*) *Cunliffe* v. *Brancker*, L. R. 3 Ch. D. 393.

(*y*) R. P. 280.

(*z*) Similarly if a term of years be bequeathed to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere possibility (*ante*, p. 138).

the law regarded as an estate, they were not subject to the ordinary course of alienation to which other estates were subject—that is to say, they could not be alienated at law otherwise than by way of estoppel by fine, though they might be assigned in equity (*a*). They are expressly mentioned as devisable by will in the Wills Act (*b*). But now by the Act to Amend the Law of Real Property (*c*), a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed (*d*).

Devise—vested or contingent.

A very difficult question frequently arises under wills, namely, whether a devise is vested or contingent. The question is important, because where the devisee dies before the event happens which is to give him possession, if the devise be vested, the property becomes transmissible to his representatives, but not so if it be contingent. Also if it vest within the period allowed (of which we are about to speak), it is then immaterial that the possession is postponed beyond that period. In general, the Courts favor a construction which gives a vested interest, but there are many exceptions (*e*). The leading case on the subject is *Boraston's Case*, which occurred *temp.* Elizabeth, and is reported 3 Co. 19*a* (*f*). In that case, there was a devise of lands for eight years, and afterwards to executors for performance of the will, till the testator's son should accomplish his full age of twenty-one years, and when he should come of age, then that he should enjoy the same to him and his heirs: the son died under age:—it was held that the remainder was executed in the son, and not in contingency; for the adverbs 'when' and 'then' in this case only denoted the time when the remainder was to take effect in possession, and not when the remainder should vest; for when these adverbs refer to a thing which must of necessity happen (as in this case, the determination of the term devised to the executors), they make no contingency. It was also held that when the particular estate upon which a remainder

(*a*) Fearne's C. R. 366; and, as to fines, see *ante*, 69; and as to estoppel, *ante*, 145.

(*b*) 1 Vict. c. 26, s. 3.

(*c*) 8 & 9 Vict. c. 106, s. 6.

(*d*) A right of entry, not fictitious, since this statute is not a 'pretenced' right within 32 Hen. VIII. c. 9, s. 2. See *Jenkins* v. *Jones*, L. R. 9 Q. B. D. 128. And see *ante*, p. 206.

(*e*) See Tudor's L. Ca. on Real Property, 833 *et seq.*, notes to *Hanson* v. *Graham*.

(*f*) Also printed in Tudor's L. Ca. p. 809.

Chap. VII.

depends may determine before the remainder takes effect, the remainder is contingent; so when it is limited to take effect upon a contingent determination of the preceding estate (*g*).

Period within which estate must take effect in possession.

There has been already pointed out (*gg*) that provision of the law which, in order to prevent the tying up of estates in perpetuity, or rather beyond a reasonable limit, restricts the inalienability of property to a life or lives in being and twenty-one years after. In consistency with this principle, it has been held that, in the instance in which an estate is given to an unborn person for his life—say, for example, to a child of A. before A. has a child born—there cannot be engrafted by way of remainder on that estate a gift to the child of that person (*h*). Were such a limitation to be allowed, the effect would be, not only to tie up the estate for the life of a person yet to be born, but for the further period of another life beyond. The second gift might not come into operation until a period considerably exceeding that of a life in being and twenty-one years afterwards. Were such limitations allowed, property could be rendered inalienable for a generation beyond the period within which it is now allowed to be tied up.

Doctrine of *cy près*.

It has been only in testamentary disposition that gifts of this nature have been found, and they have given rise to a doctrine called by the name of *cy près*.

The Courts will not allow the intention of the testator to be carried out in the precise mode indicated, by reason of its infringement of the law. Discovering, however, in the will what is termed a general intention of the testator to perpetuate his property to his posterity, in the cases in which there occurs a limitation to an unborn person for his life with remainder to his issue in tail, the Court has carried out this intention so far as was consistent with the rules of law—namely, by construing the limitation to the unborn child, not an estate for his life only, but one in tail, the utmost which can be done towards securing an estate in a family. Under this construction, the unborn issue of the unborn child would, in the event of the parent not having destroyed the entail, have a right of possession; while, construing the gift to the parent as one to himself in tail, the parent is left with the ordinary power of alienation vested in every tenant in tail, and

---

(*g*) See recent cases of *Andrew* v. *Andrew*, L. R. 1 Ch. D. 410; and *Thring* v. *Salter*, W. N. (1883), p. 61. *Hoe* v. *James*, 1905.

(*gg*) *Ante*, p. 98.

(*h*) Notes to *Cadell* v. *Palmer*, Tudor's L. Ca. 474.

the estate, instead of being tied up, thus becomes alienable. The doctrine derives its name of *cy près* from the two corresponding French words, signifying 'as near,' the intention thus being carried out 'as near' as the rules of law will admit. This doctrine, it must be understood, is only applied where the estates to the children of the unborn child are estates in tail (*hh*).

c. Executory devises.

Reversions and remainders constitute the two more prominent classes of future estates; but there is a third which was recognised at common law, and without the aid of the Statute of Uses (of which hereafter), called an Executory Devise, which is also future in its nature, and should be noticed here. One fee simple estate, as we have seen, cannot be engrafted on another by way of remainder,—in other words, a fee cannot be limited on a fee; but there may be a limitation of alternative fees, one remainder in fee simple being substituted for another. So in the case of an executory devise, though one fee simple estate cannot be engrafted or limited upon another, it may be annexed to another so as to take effect by way of substitution upon the happening of some particular event. Such an estate could not have been granted by deed or feudal grant; but in the liberality afforded to testamentary disposition, it was allowed existence under a will. Thus, suppose a testator to devise lands to his infant son and his heirs; this *primâ facie* would exhaust the whole ownership, and no remainder could be limited upon it. But were the testator to go on to add that should the infant son die under twenty-one, the estate should go over to another and his heirs; on the event happening, this ulterior limitation would operate by way of substitutionary gift, and it would be termed an executory devise. This future or executory interest, unlike the contingent remainder, is in its nature indestructible, and when the time comes, arises as it were, from its own inherent strength (*i*).

Speaking of such interests, Blackstone says (*k*):—

"In devises by last will and testament (which, being often drawn up when the party is *inops concilii*, are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice), in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders;

(*hh*) *Hale* v. *Pew*, 25 Beav. 335. See notes to *Cadell* v. *Palmer*, Tudor's L. Ca. 493; and Wms. 272.

(*i*) Wms. 286.

(*k*) 2 Bl. Com. 172.

Chap. VII.

but call them by another name, that of 'executory devises,' or devises hereafter to be executed.

"An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee simple or other less estate, may be limited after a fee simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same."

Alienation.

An executory devise was formerly, to the same extent as a contingent remainder, incapable of alienation so long as its ultimate vesting remained in a state of suspense. Now an executory interest can be disposed of by deed, 'an executory and a future interest' being included in the provision of the Act to Amend the Law of Real Property already adverted to (*l*). And in the Wills Act (*m*), all contingent, executory, or other future interests are declared to be devisable.

Period within which estate must arise.

As in other instances of future estates, and in order to guard against the mischiefs of a perpetuity, the law has prescribed a limit within which interests of this class must take effect.

The rule as to the limit for the creation of executory interests, was finally settled in a case before the House of Lords in 1833 (*n*). There the doubt expressed was whether the term of twenty-one years after lives in being might be added as a term in years: the question was put by the Lords to the Judges:—

"Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards as a term in gross, and without reference to the infancy of any person who is to take under such limitations, or of any other person?"

The Judges answered that such a limitation is not too remote or otherwise void. And they added, that a further period for gestation was to be allowed in those cases only in which the gestation exists.

The Lord Chancellor, in moving the judgment of the Court, said:—

"The rule originally introduced was limited to a life, then to lives

(*l*) 8 & 9 Vict. c. 106, s. 6. *Ante*, p. 219.

(*m*) 1 Vict. c. 26, s. 3.

(*n*) *Cadell* v. *Palmer*, 7 Bligh, N. S. 202; and Tudor's L. Ca. on Real Prop. 424.

in being, and afterwards was extended for convenience, to the end of the infancy of the children of the person to whom the life estates were limited."

From when period runs.

The period from which the time allowed by the rule begins to run, is from the death of the testator (*o*).

Possible, not actual, events considered.

Possible, and not actual, events are alone considered; and, consequently, no limitation will be good unless it necessarily, if at all, takes effect within the time allowed by the rule (*p*).

—failure of issue.

Thus, an executory devise to arise after an indefinite failure of issue will be void, as against the rule. Suppose, for instance, there be a gift to A. and his heirs, with a limitation over, on the failure of the issue of B., a stranger, to C. and his heirs; now, it is evident that, though the issue of B. might fail in the lifetime of A., it might not fail for centuries; and during that period the property would be inalienable, inasmuch as A. could not, in case it were an executory devise, bar or destroy the estate limited to C.: it is therefore void as too remote (*q*). Many difficult questions arose as to whether words importing a failure of issue meant a general failure, or a failure of issue at the death of such person (*r*); but these are for the most part got rid of by the provision of the Wills Act (*s*), that in general, words importing failure of issue mean issue living at the death (*t*).

Limitation after an estate tail.

But in speaking of "a limitation by way of executory devise being void as too remote," it must be understood as relating to such executory limitations as are limited on estates in fee simple or terms for years; for, speaking generally, no period is too remote for the limitation of an executory estate or interest engrafted on an estate tail previously limited. Thus, if land were limited to A. in fee simple or for ninety-nine years, and if A. should have no child who attains the age of twenty-seven years, to B., in each case the limitation to B. would be void for its remoteness; but if land were limited to A. in tail, and if A. should have no child who attains the age of twenty-seven years, to B., the limitation to B. will be good. The reason is, that where an executory limitation is engrafted on an estate tail, it is always liable to be barred by the tenant in tail, and therefore the remote-

(*o*) Tudor's L. Ca. 465.

(*p*) Notes to *Cadell* v. *Palmer*, Tudor's L. Ca. 465.

(*q*) *Ib.* 466.

(*r*) See *Forth* v. *Chapman*, Tudor's L. Ca. 682.

(*s*) 1 Vict. c. 26, s. 29.

(*t*) Of this hereafter, in the chapter on Wills.

Chap. VII.

ness of the event on which it depends does not suspend the absolute ownership of the property so as to effect a perpetuity (*u*).

Effect of remoteness.

Where a limitation is void as being too remote, any subsequent limitations are not thereby accelerated, but are void also (*x*).

Example of void devise.

A good instance of an executory devise void for remoteness is to be found in a recent case (*y*). A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage, for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares; the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters or the female issue of any deceased child to be settled as therein mentioned. It was held by Jessel, M.R., that the whole of the gifts after the life interest of the widow were void for remoteness.

Effect of failure of prior gift on executory devise.

An executory devise limited to arise upon the failure of a prior interest may arise, although the failure has not happened in the particular mode anticipated by the testator; for it is considered that the testator's intention was that the ulterior gift should take effect at all events upon the failure of the prior one. Thus A. devised a term for years to his wife for life, and after her death to the child she was then *enceinte* with, but if such child died before twenty-one, then he devised one third part of the said term to his wife. The wife not being *enceinte* at the time of the devise, it was held that the devise to her was good, though the contingency never happened (*z*).

Restriction on executory limitations (Conveyancing Act, 1882).

By the Conveyancing Act, 1882 (*a*), a restriction has been placed on executory limitations contained in any instrument coming into operation after 1882, by providing that where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of issue, whether a time be specified or not, the executory limitation shall be void

(*u*) Fearne's Cont. Rem., note by Butler, 522.

(*x*) Notes to *Cadell* v. *Palmer*, Tudor's L. Ca. 489.

(*y*) *Hale* v. *Hale*, L. R. 3 Ch. D. 643. See *Pearks* v. *Moseley*, L. R. 5 App. Cas. 714. *Ante*, p. 99.

(*z*) *Jones* v. *Westcomb*, Tudor's L. Ca. 869; and see the notes.

(*a*) 45 & 46 Vict. c. 39, s. 10.

as soon as any such issue has attained twenty-one years. Thus, the settlement is put an end to at a point of time corresponding, as nearly as may be, with that at which, if the land were entailed, the entail could be barred. Hitherto, where there is, for instance, a limitation to a man and his heirs, but if he shall die without leaving issue living at his death, then over, the land has been unsaleable during the life of the tenant in fee, except with the concurrence of persons not ordinarily likely to concur. Transfer is thus facilitated by this new enactment.

III. Recapitulation.

To recapitulate briefly—if a tenant in fee simple grant to another person any estate less than the fee simple, what he retains in himself is called the 'reversion'; what he grants away is called the 'particular' estate. But if, instead of reserving what is left beyond the particular estate, he grants away that also, that is called a 'remainder'; if that remainder is from its creation always ready to come into possession the moment the particular estate or estates (for there may be several, one after another) come to an end, it is called a 'vested remainder.' But if it be not so ready from its creation, and its readiness depends on the happening of some contingency, until the contingency happen it is called a 'contingent remainder'; the contingency having happened, it will at once become a vested remainder. Until recent legislation, in all cases if the particular estate came to an end while the remainder was contingent, the contingent remainder was destroyed. On the other hand, an estate by 'executory devise' depends on no particular estate, but arises as it were of itself when its own time comes.

Thus, if A. grant to B. land for a term of years or for life, or even an estate tail, what remains in A. is called his reversion; but if A. grants an estate for life to B., and after his decease to C. in fee simple, the estate granted to C. is an estate in remainder, and it is vested, as it is ready to come into possession on the failure of the estate of B. from the moment of its creation. But if A. grant an estate for life to B., and, C. then being a bachelor, the remainder to the eldest son of C., the remainder is contingent; but, after the marriage of C., on the birth of a son, if B. be still living, such remainder will become vested. Should, however, B. die before the birth of such son, and thus his particular estate, on which the remainder depended, fail before the contingency—that is, the birth of a son to C.—happen, (before the legislation spoken of) the contingent remainder would be destroyed.

Chap. VII.

On the other hand, if A. by will devised lands to his son in fee simple, such son being then an infant, and in case such son should die under the age of twenty-one years, then to his nephew in fee simple, the son would take an estate in fee simple in possession subject to an executory interest in the nephew, which interest would cease on the son attaining twenty-one, but, on the other hand, would become absolute on the son's death under that age—that is to say, the one estate in fee simple would displace the other, not coming in by way of remainder on a particular estate, for there can be no remainder limited to take effect after an estate in fee simple. Therefore, the estate to the son and to the nephew respectively were not a particular estate and contingent remainder respectively; but an estate in fee simple in possession in the son, and an estate in fee simple by way of executory devise in the nephew.

CHAPTER VIII.

OWNERSHIP.

We have hitherto been considering estates with reference to their own particular natures and the incidents to which they are subject. We will now consider the differing positions in ownership of them capable of being occupied by the individuals in whom that ownership may be vested—in other words, the 'quality' of their estates.

Estates may be held for an ownership (1) in Severalty; (2) in Joint Tenancy; (3) in Coparcenary; or (4) in Common. Four kinds of ownership.

Severalty is the more ordinary species of ownership, and an estate is said to be held in Severalty when it is held either by some individual or body corporate in a separate ownership, and without the participation in that ownership of any other party. Thus, in the case of a grant to A., being a private individual, or of a grant to a corporation, A. in the one case, and the corporation in the other, would each take an estate in severalty. They would not do this the less, if, in the former case the grant were to A. and his heirs, or to A. and the heirs of his body, in the latter to the corporation and their successors, since the words of inheritance or succession, though they would point in terms to other parties, would in fact indicate only the estate to be conferred by the grant, for example, whether for life or in perpetuity, or for a more limited interest. I. Severalty.

It is the individual and exclusive ownership that distinguishes an estate in Severalty from all the three other classes of ownership referred to, namely, joint tenancy, coparcenary, and tenancy in common. These latter have each of them other sharers participating in the ownership, while their interest is not in any particular parcel of the common aggregate, but an undivided share of the whole. Thus, in the case of land or a house held under either of these three titles, no one member of the common body has a right to any separate or particular acre in the land or room in the house. Each has his undivided share only in the whole. But let a partition in the common property be made and the share of each be allotted to him, then each will take certain

Chap. VIII.

ascertained parcels of the land or rooms of the house, which will thenceforth be held by him in severalty.

While possessing this common characteristic, each of the three interests, joint-tenancy, coparcenary, and tenancy in common, has features distinguishing it from the other.

II. Joint tenancy. Right of survivorship.

Joint tenancy, as its name bespeaks, is essentially a joint interest: whatever may be the rights as between themselves, as regards strangers all the holders of an estate in joint tenancy are regarded but as a single individual. It results from this principle, that, so long as there remains any participant of the joint ownership, so long does the estate continue, and, therefore, in case of the death of one or more it will survive to the remainder. Thus, in the case of a grant of lands to A. and B. jointly for their lives, each will be entitled to a moiety or equal half of the rents and profits for their joint lives, but the death of one would not put an end to the estate; it would only create a survivorship or representation to the whole estate in the other, and give him the entire interest in the rents and profits. So, if lands were given to A. and B. and their heirs, on the death of either A. or B. the survivor would take the whole for an estate in fee simple.

Such is the general rule, though in the case of the creation of an estate in tail—*e.g.*, to A. for life, and after her death to the children of her body lawfully to be begotten, and to the heirs of their respective bodies—there would be an exception; the children would be joint tenants for their lives with several inheritances in tail (*a*). A gift to several (who cannot intermarry), and the heirs of their bodies, creates a joint tenancy for life, and several inheritances in tail.

By reason of the right of survivorship, '*jus accrescendi*,' as it is called, the lands of a joint tenant are not liable to dower or curtesy (*b*).

But if by survivorship the jointure be gone, dower will attach, for the ownership has become one in severalty. There is an old case (*c*), which occurred in the time of Queen Elizabeth, where a father and son being seised as joint tenants, with remainders to the heirs of the son, they had the misfortune to be hanged; and both were hung at the same time in one cart. The son's wife

(*a*) *In re Tiverton Market Act*, 20 Bea. 375.

(*b*) Co. Litt. 183*a*, ed. by Thomas, vol. i. p. 746. Notes to *Morley* v. *Bird*, Tudor's L. Ca. on Real Prop. p. 884.

(*c*) *Broughton* v. *Randall*, Croke's Rep. *temp.* Eliz. 503.

could only have claimed her dower on the supposition that her husband had survived his father, since, had the father survived, there would not have been that legal seisin in possession in the son upon which alone the dower would have attached. The Court awarded her dower to the wife, and it would seem that the survivorship was inferred mainly from proof given in the cause of the shaking of the son's legs.

And, on the principle expressed in the maxim *jus accrescendi præfertur oneribus*, a rent-charge granted by a joint tenant will not be binding on the survivor (*d*).

Unities.

There are certain inherent conditions to an estate in joint tenancy, namely, (1) oneness of title; (2) oneness as to the time of the title's commencement; (3) similarity of interest as regards the quantity of the estate, and (4) an entirety and equality of interest in the whole. These conditions are sometimes called the four 'unities' of title, time, interest, and possession (*f*).

1. of title.

By oneness or 'unity of title' is meant that the estate must be created by one and the same instrument, or originate in one and the same act (*g*). Thus, one party cannot acquire his title by deed and another by will, or partly by both; and so, if the title be one originating in wrong, as by the disseisin (*h*) of some former holder, all the parties claiming to hold a joint tenancy under the disseisin must derive their title under one and the same disseisin, not under ousters effected at different periods (*i*). As Littleton puts it (*k*):—

> "If two or three, &c., disseise another of any lands or tenements to their own use, then the disseisors are joint tenants. But if they disseise another to the use of one of them, then they are not joint tenants; but he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin."

A recent instance occurred of the application of this doctrine. Two persons were in lawful possession of a property, but the title under which they held came to an end—they were tenants *pur autre vie*, and the life ended, yet they continued in possession

---

(*d*) Litt. s. 286, ed. by Thomas, vol. i. p. 747. Notes to *Morley* v. *Bird*, Tudor's L. Ca. on Real Prop. p. 884.

(*f*) So Cruise (quoted in *Morley* v. *Bird*, Tudor's L. Ca. 882); and Blackstone, vol. ii. 181.

(*g*) It must be created by some act, for an estate in joint tenancy cannot arise by descent (2 Bl. 181).

(*h*) *i.e.*, a wrongful putting out of him that is seised of the freehold.

(*i*) 2 Bl. 181.

(*k*) S. 278, ed. by Thomas, vol. i. p. 729.

Chap. VIII.

as owners; thus they went on holding without any title whatever, and so continued for more than twenty years. The question arose in what capacity they so held on. It was decided that they held as joint tenants. Lord Hatherley said:—

"The possession of each became wrongful at the same moment of time, so that they acquired their title at the same moment of time, they held by one common right or by one common wrongful title, whichever you please to call it, and they have done nothing to sever their tenancy" (*l*).

2. of time.

As regards the oneness or 'unity of time' of the commencement of title, the estate must vest in every member of the body at one and the same moment of time, for the different individuals form together but one person. This is shown in the words hitherto used in creating a joint estate in fee simple, for it is limited to A., B., C., and their heirs, though the heirs of one only, namely, of the survivor, will succeed to the inheritance. Thus, says Lord Coke (*m*):—

"If lands be demised for life, the remainder to the right heirs of J. S. and J. N.; J. S. hath issue and dieth; and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time."

Such at least is the doctrine of the common law; but it flows out of the Statute of Uses (which we shall consider in the next chapter), that estates taking effect under that statute, though vesting at several times, may nevertheless become estates in joint tenancy. Thus, says Lord Coke (*o*):—

"If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry, for the term of their lives, and after he taketh wife, they are joint tenants, and yet they come to their estates at several times."

The reason of the difference is that, in the case of the use, the estate is vested and settled in the feoffees till the future use comes into *esse* (*q*). Another departure from the rule at common law, namely, that persons who are to take at different times cannot

(*l*) *Ward* v. *Ward*, L. R. 6 Ch. App. 791.

(*m*) Co. Litt. 188*a*, ed. by Thomas, vol. i. 731.

(*o*) Co. Litt. 188*a*, ed. by Thomas, vol. i. 732. Notes to *Morley* v. *Bird*, Tudor's L. Ca. 882.

(*q*) Co. Litt., ed. by Thomas, vol. i. 752, [note Hargr.].

take as joint tenants, is in the case of estates created by devise. Thus a testator devised lands to his widow for life, and after her death to his daughter Isabella and her children on her body begotten or to be begotten by William her husband, and their heirs for ever (*r*). It was held that Isabella and her children took as joint tenants, she having one child at the time of the testator's death and other children subsequently born (*s*). Therefore, in the case put by Lord Coke of the devise in remainder to the right heirs of J. S. and J. N., though the issue of J. S. would not take as joint tenants, but as tenants in common with the issue of J. N., yet the issue of J. S. and of J. N. respectively would take as joint tenants between themselves (*t*). The law is thus stated by Mr. Jarman (*u*) :—

"Under a limitation in remainder of a use to children, they are not, as they come *in esse*, let in with other persons who have not the whole interest; but the whole body always hold the whole interest, letting in other members of the body as they come *in esse*. But at common law when the interest has once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the *cestui que use* comes *in esse*. Therefore, you have at once and for all to ascertain whether he would take the whole or a moiety: the intent being that he should take a moiety and not the whole, if he took the whole it would be against the intent. The result is, he takes a moiety, and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust, a Court of Equity will follow what is said to be the reason of the rule on uses and devises, viz., the intent, and the intent as appearing by the words, is to create a joint tenancy."

In a case before Page-Wood, V.C. (*x*), the question arose under a will of personalty. There was a bequest of residuary personal estate to Harriet E. Leatham for life, and should she have a child or children then to it or them for ever. After the death of the testatrix Harriet married and had issue. It was held that, pursuing the intent of the gift, and by analogy to estates created

(*r*) *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 1172.

(*s*) *Kenworthy* v. *Ward*, 11 Ha. 203.

(*t*) *Bridge* v. *Yates*, 12 Sim. 645.

(*u*) Jarman on Wills, vol. ii. p. 254; it is in fact a summary of the judgment of Lord Hatherley, (then Page-Wood, V.C.), in *Kenworthy* v. *Ward*, 11 Ha. 196.

(*x*) *Kenworthy* v. *Ward*, *supra*.

Chap. VIII.

by way of use or devise, as distinguished from estates raised by conveyance at common law, the children of Harriet, notwithstanding their interests vested necessarily at different times, namely as they came into *esse*, took as joint tenants.

It has, however, been said by Kindersley, V.C., in answer to some observations of Page-Wood, V.C., that the case would have been different if the vesting of the children's estate depended, *e.g.*, on their attaining twenty-one (*y*). For where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in common is created; for there may be several children, some of age, others not, and those who have contingent interests cannot take as joint tenants with those who have vested interests, since there is no mutuality of survivorship (*z*).

3. of interest.

Next, as to the similarity of interest as regards the quantity of the estate, or 'unity of interest.' The quantity or duration of the estate of each owner must be the same. And here it should be premised that any estate may be held in joint tenancy. But one party cannot be seised for an estate of freehold, as for instance for life, and another for a chattel interest, *i.e.*, for years; nor can one be tenant in fee, and the other tenant in tail. But this would not exclude a commencement of estate amounting to a joint tenancy as to a portion of the ownership, consistently with separate interest as to another portion of it. Thus an estate might be limited to A. and B. for their joint lives, with remainder to A. in fee; the separate interest in A. expectant on the determination of the estate to A. and B. would not prevent that estate from being one in joint tenancy. So, to reverse the illustration, in the case of the limitation of an estate for life to A., with remainder to A. and B. and their heirs, the remainder would constitute a joint tenancy in A. and B., notwithstanding A.'s separate interest in the prior particular estate (*a*). An estate carved out of another, but not exhausting it, may be joint in one class of individuals as far as regards that estate itself, though one of the class has an interest beyond it.

4. of possession.

As to the entirety and equality of interest among the joint tenants in the whole—*i.e.*, the 'unity of possession'—the joint tenants do not hold in distinct shares, but each is equally entitled to the whole. This peculiar undivided seisin is termed in the

(*y*) *Ruck* v. *Barwise*, 35 L. J. Ch. 17.
(*z*) 2 Jarman on Wills, 255.
(*a*) 2 Bl. 181.

ancient law books, a seisin *per my et per tout*. As to this, Blackstone (*b*) says:—

"Joint tenants are said to be seised *per my et per tout*, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety."

On this Mr. Manning (*c*) says:—

"It is true that, for certain purposes of merger, and where the joint tenancy happens to be between two persons only, their potential aliquot parts may, without impropriety, be termed 'moieties.' But this is not implied in the terms '*per my et per tout*;' the term '*my*' signifying, not a 'moiety,' but 'not in the least.' And therefore Lord Coke gives the exact force of the expression 'seised *per my et per tout*,' by describing the party so seised as one, '*qui nihil habet et totum habet*'" (*d*).

The above must be taken subject to the provision of the Limitation Act, 3 & 4 Wm. IV., c. 27, which enacts—

S. 12. "That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

Since the passing of the statute, therefore, the possession of the land by one cannot be considered as the possession of another; nor, consequently, can the entry of one have the effect of vesting the possession in the other (*dd*).

Husband and wife by entireties.

There has been cited above the case put by Lord Coke of a gift to a husband and wife as illustrative of a joint tenancy arising under two different periods of commencement of title. But, in strictness, this is not a gift to them in joint tenancy, they would

(*b*) Vol. ii. 182.

(*c*) In a note to *Murray* v. *Hall*, 7 C. B. 455.

(*d*) See Co. Litt. 186*a*, ed. by Thomas, vol. i. 733.

(*dd*) *Woodroffe* v. *Doe* d. *Daniell*, 15 M. & W. 792.

Chap. VIII.

be tenants 'by entireties': husband and wife being said to be but one person in law, they cannot take the estate by moieties, but both are seised of the entirety (*e*),—in other words, of the whole but not of a part; and therefore the one cannot dispose of any part without the other. They are said to be seised *per tout*, and not *per my et per tout* as joint tenants (*f*). Indeed, were an estate conveyed to a husband and wife and to a third party jointly, the husband and wife together would be interested to the extent of a moiety only instead of one-third each, and the third party would also be interested to the extent of a moiety, in the same way as if the grant had been but to two persons only (*g*).

Release to joint tenant.

As each tenant has seisin of the whole, he cannot alienate his interest to another tenant by a conveyance as to strangers, but the proper assurance is by release, and he to whom the release is made takes a fee simple without the word 'heirs,' because he is seised *per my et per tout* of the fee and inheritance (*h*). By the Conveyancing and Law of Property Act, 1881 (*i*), in a deed executed after 1882 it is sufficient, in the limitation of an estate in fee simple, to use the words 'in fee simple' without the word 'heirs'; but the Act does not make it necessary to limit the estate where it was not necessary before.

Severance.

The natural incident of survivorship, or as it is called '*jus accrescendi*,' which is the consequence of the joint nature of the estate, is conditional only on the estate remaining unchanged in its character at the death of one of the joint holders. For the joint nature of the interest in an estate held in joint tenancy does not preclude any holder from an alienation of his share, provided this be done in his lifetime; and the effect of an alienation would be what is called a 'severance' of the tenancy. The effect of this severance, destroying as it would the joint tenancy, would be to destroy at the same time the right of survivorship as to the share alienated; for the alienee would not hold jointly with the other co-sharer, or co-sharers, but as a tenant in common with him or them; his title having a different origin, and commencing at a different period from his or theirs. If more than one of the original co-sharers be left after such alienation, they would

(*e*) Co. Litt. 187*a*, ed. by Thomas, vol. i. 740, and note.

(*f*) Notes to *Morley* v. *Bird*, Tudor's L. Ca. 900.

(*g*) Litt. s. 291; see ed. by Thomas, vol. i. 739 *et seq.*

(*h*) Litt. s. 804, ed. by Thomas, vol. i. 764, and note.

(*i*) 44 & 45 Vict. c. 41, s. 51.

still remain joint tenants as between themselves. Thus, suppose A., B., and C. to be joint tenants in certain lands, and A. to alien his share, A.'s alienee would take one equal undivided third as tenant in common against B. and C., which on his death intestate would descend to his heir: but B. and C. would remain joint tenants in two undivided thirds, and on the death of either, no alienation having been made, the survivor of them (B. and C.) would take the whole two-thirds. From the moment of severance, then, the only unity left as between the alienee and other co-tenants is that of possession.

It was stated as a condition of this severance, that it should be effected by some act *inter vivos*, during the life of the party. It could not be effected by will, and for the simple reason that a will taking effect from and after the death of the party, the very act of death would have taken away the interest of the co-sharer, and transferred it, by virtue of the *jus accrescendi*, to his surviving companions in the ownership; so that at the time the will came into operation, which of course could not be until after death, there would have been nothing left in the testator for the devise to operate upon. This is expressed by the maxim, *jus accrescendi præfertur ultimæ voluntati* (*k*).

Partition.

But not only may a joint tenant alienate his share, he may obtain a partition of the community of holding, and an allotment to himself in severalty of some specific portion of the common property, commensurate in point of value with his share in the undivided whole. Originally, and at common law, he could do this only by the common agreement of all the co-sharers, the law not permitting any to destroy the common possession without the universal consent; and it was necessary that conveyances should be executed for the purpose of vesting in each party a sole estate in the allotment to be taken by him (*l*). But a covenant by a joint tenant to sell, though not severing the joint tenancy at law, would in equity (*ll*).

Certain statutes, however, of the reign of Henry VIII. rendered partition at law compulsory at the instance of any member of the common body, by suing out a writ for that purpose, called a 'writ of partition.' This form of action was abolished by 3 & 4 Wm. IV. c. 27, s. 36, but a partition was obtainable by a suit in equity;

(*k*) Co. Litt. 185*b*, ed. by Thomas, vol. i. p. 752.

(*l*) Alnatt on Partition, 123.

(*ll*) *Brown* v. *Raindle*, 2 Ves. 257.

Chap. VIII.

and now under the Partition Act, 1868 (*m*), it can be obtained by action in the Chancery Division of the High Court, or, where the property does not exceed £500 in value, in the County Court of the District. The Court orders a partition to be made in Chambers, or a commission to be issued for the purpose (*mm*). Whether the partition be by agreement or by decree of the Court, mutual conveyances between the parties must be executed (*n*), which, as we have seen, should be in form releases, and under the Act to Amend the Law of Real Property they must be by deed (*o*).

But partition may be made also without conveyances through the Land Commissioners (formerly called the Inclosure Commissioners), under numerous statutes (*p*), which is the cheaper method, and now more usually adopted.

In cases where the Court would formerly make a decree for partition, it now has power under the Partition Act, 1868 (*q*), at the request of any party interested, notwithstanding the dissent or disability of others, to direct a sale (*r*); and at the request of the party or parties interested, individually or collectively, to the extent of one moiety or upwards, it is bound to direct a sale of the property and distribution of the proceeds instead of a division of the property, "unless it sees good reason to the contrary" (*s*). In a recent case (*t*), it was much discussed what was the meaning of the words in the statute, "unless it see good reason to the contrary." Jessel, M.R., after quoting the section, said:—

"Now, therefore, there is an absolute right in the owner of a moiety to require a sale subject to this: unless it sees good reason to the contrary, the Court shall direct a sale. In this case the plaintiff has one moiety, and the principal defendant, who has the other moiety, asks for a sale. Therefore, he has an absolute right to a sale, unless the Court sees good reason to the contrary. Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see some good reason why there should not be a sale. I do not say there

(*m*) 31 & 32 Vict. c. 40, s. 12, and Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34.

(*mm*) See Practice of the Supreme Court, Ch. D., by F. Evans, 607.

(*n*) *Attorney-General* v. *Hamilton*, 1 Mad. 214.

(*o*) 8 & 9 Vict. c. 106, s. 3. See form of Agreement for Partition, 2 Da. i. 101, and several forms of Deeds of Partition, 5 Da. pt. ii.

(*p*) Beginning with 8 & 9 Vict. c. 118; and see The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48.

(*q*) 31 & 32 Vict. c. 40 (amended by 39 & 40 Vict. c. 17).

(*r*) S. 3.

(*s*) S. 4.

(*t*) *Porter* v. *Lopes*, L. R. 7 Ch. D. 358.

may not be some other reason from the peculiar nature of the property, but it must be a good reason against the sale.

"There are reasons which will strike one at once against a sale. Property may be of a peculiar description, so as not to be actually saleable, or, at the time the sale is asked for, may be temporarily very much depreciated in value. To give an illustration: If there were two ironworks of equal value, and one party asked for a partition, and the other for a sale, and at that time the furnaces were out of blast, it would be obvious that that would not be a good property to sell, and the Court would not be able to direct a sale. There are cases where the nature of the property was such that you could not well sell it. There are various properties of such a nature; thus, where the property is so attached to some other property, or such a mere dependence on another property, as to be almost valueless except in connection with that property, though of very great value in connection with it. In that case one of the two owners would say, "Do not sell it, we can partition and divide the property; if you sell, it will fetch a song or nothing," unless some one choose to puff at the sale merely for the purpose of compelling the other owner to bid; but he would not do that at the risk of having the property left on his hands.

"To show what I mean: Suppose part of the property was a mere outhouse, or a portion of a room or a portion of a warehouse attached to some other larger property, which would have actually no saleable value, though of a very considerable value to the owner of the house, it seems to me it would be right to say that a sale was not the proper mode. Again, you may have very peculiar rights, which cannot be very properly divided, attached to property,—manorial rights, and rights to game and things of that kind,—which could not be properly severed from the land or well sold. All these are objections to the sale, and I think those are the chief objections the Court has to consider.

"Then the suggestion that the Court is to be guided also by the capability, if I may say so, of the property to be partitioned, is not to be forgotten. Where there is some objection to a sale, and, in addition to that, the property can be readily partitioned; of course, that comes in aid of what might otherwise be not a sufficient objection to a sale, standing alone. For instance, it might be that the property was not readily saleable, but still it could be sold; but then it could be very easily and readily partitioned. In that case, I should say, that that fact might be prayed in aid of the objection to a sale which might not by itself have prevented the sale, and make the Court think there was a sufficient reason shown for there not being a sale. But in all cases the obligation of proof lies on the person who asserts there shall not be a sale, if the persons or person entitled to a moiety request a sale."

The necessity of conferring this power of sale upon the Court may be seen from consideration of the following case:—

Plaintiff was entitled to two-thirds of a house, and defendant to the other third; it was of great value to both parties; to the defendant as shopkeeper, and to the plaintiff as contiguous to other estates. Lord Eldon at first, out of mercy to the parties, let it stand over, proposing a

Chap. VIII.

reference as to the value, and to which party the option of buying or selling should be given; and afterwards he said, the difficulty was no objection in that Court. He was, therefore, of opinion that if the parties insisted upon having the law take its course, the commission to partition might proceed. The commission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase in the house, and all the conveniences in the yard. But Lord Eldon overruled the exception, saying, he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell (*u*).

Settled Land Act, 1882.

Now, by the Settled Land Act, 1882 (*x*), the same power of partition is given to tenants for life and other limited owners generally as of sale in respect of settled lands, where the settlement comprises an undivided share in land, or, under the settlement, the land has come to be held in undivided shares (*y*). It is not therefore necessary now to provide in a settlement for partition in ordinary cases; but, if necessary, special powers can be added, which will operate as if conferred by the Act unless a contrary intention is expressed in the settlement (*yy*).

Severance by accession of interest.

Independently of either alienation or partition, a joint tenancy may also be destroyed by an accession of a new interest beyond that to which the joint tenancy applies. Therefore, if there be two joint tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure (*z*).

Trustees.

Covenants by and with joint tenants.

Trustees are always made joint tenants, and joint tenancy usually indicates trusteeship. In the case of a sale by trustees, where the trust is disclosed, the trustees only covenant that they have not encumbered, and the form of covenant is several —that is, each of them covenants so far only as relates to his own acts, &c. (*a*). Where the conveyance is by joint tenants as beneficial owners, they enter into the usual covenants for title, but also in the form indicated, namely, a several covenant confined to their own acts, &c.; for, if they were to covenant jointly, all would be liable originally for the acts of each, and the whole burden of the covenant would devolve on the survivors or sur-

(*u*) *Turner* v. *Morgan*, 8 Ves. 143.
(*x*) 45 & 46 Vict. c. 38 (ss. 3 (iv.), 4, 19, 20, 31, 45).
(*y*) See *ante*, chaps. i. and ii. pp. 56, 76.
(*yy*) 45 & 46 Vict. c. 38, s. 57.
(*z*) 2 Bl. 186.
(*a*) See form, 2 Da. i. 266.

vivor (*b*). But if the conveyance is to them and the covenants are entered into with them, the covenants should be with them jointly (*c*). Such covenants by joint tenants may now be shortened in form, by virtue of the Conveyancing and Law of Property Act, 1881 (*d*). Thus, where each conveys as beneficial owner, a several covenant will be implied; similarly, if all convey as beneficial owners, a joint covenant will be implied (*dd*).

III. Coparcenary.

The nature of an estate in Coparcenary is best explained in the words of Blackstone. He says (*e*):—

"An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or particular custom. By common law: as where a person seised in fee simple or in fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, and these co-heirs are then called 'coparceners'; or, for brevity, 'parceners' only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them.

"The properties of parceners are in some respects like those of joint tenants; they have the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands: and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other: but herein they differ from joint tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by a writ of partition, but till the statute of Henry VIII., joint tenants had no such power. Parceners also differ materially from joint tenants in four other points: 1. They always claim by descent, whereas joint tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint tenants; and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. 2. There is no unity of time necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety; and of course there is

(*b*) See form, 2 Da. i. 359, note.

(*c*) 1 Da. 112, 114; and 2 Da. i. 359, note, and 421.

(*d*) ~~44 & 45 Vict. c. 41, s. 60.~~

(*dd*) See ss. 7, 64, and examples by Wolstenholme & Turner, pp. 24, 191.

(*e*) Vol. ii. p. 187.

Chap. VIII.

no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants thereof, whether male or female, called parceners."

Partition.

"They are called parceners," says Littleton (*f*), "because by the writ the law will constrain them, that partition shall be made among them." This was at common law, and not as in the case of joint tenants or tenants in common under the statutes (*g*), because, it was said, descent was the act of the law (*h*). Also, at common law partition might be by parol, it did not require an actual conveyance; for by partition the coparceners do not acquire their shares by purchase, but continue to be entitled by descent. For the same reason in case of the death of one intestate, the heir is to be sought, not from such one as last purchaser, but as if no partition had been made (*k*). Partition may now be obtained as in the case of joint tenancy.

Like joint tenancy, coparcenary is destroyed by the destruction of the unity of the title. Thus an alienation by one coparcener destroys the coparcenary as to that one. Of course, in the event of the subsequent descent of an estate upon a single coparcener, there is no community surviving, and the coparcener thenceforth holds in severalty (*l*).

Advowson (in whom right to present).

There is a peculiarity in reference to the estate of coparcenary, namely, in reference to an advowson, or the right of presentation to a living, that is, the appointment of a clergyman to an ecclesiastical benefice.

When an advowson descends to coparceners and they cannot agree to present, they present successively according to seniority; and this privilege extends not only to the heirs, but to the assignees of each coparcener, whether by conveyance or act of law; so that a tenant by the curtesy shall have the same turn as his wife would have had (*m*). And notwithstanding partition, each coparcener will present in turn, unless there has been an express exception, because in the case of coparceners, the severance by partition is said to take place by operation of law (*n*).

(*f*) S. 241, Co. Litt., ed. by Thomas, vol. i. 679.

(*g*) Viz., of Hen. VIII. *Ante*, p. 235.

(*h*) Co. Litt. 163*b*, ed. by Thomas, vol. i. 682. *Ante*, p. 133.

(*k*) *Doe* v. *Dixon*, 5 Ad. & El. 834.

(*l*) 2 Bl. 191.

(*m*) 2 Da. i. 38.

(*n*) *Fox* v. *Bishop of Chester*, Tudor's L. Ca. on Real Prop. 257.

On the other hand, joint tenants and tenants in common must concur in a presentation, but if they present different clerks, the bishop may admit either or refuse both; but where a Protestant and a Papist are tenants in common, the right of presentation is in the Protestant alone. If tenants in common cannot agree in presentation they must draw lots for choice (*o*).

IV. Tenancy in common. Creation.

Tenancy in Common differs from coparcenary in that it cannot be created by descent, and, on the other hand, its only similarity as regards the unities to a joint tenancy is its unity of possession. Thus Blackstone says (*p*):—

"Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is an unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would soon be destroyed."

Common Law. Equity.

It has been said that, while the law was in favor of a joint tenancy, equity favored the tenancy in common. The following case (*q*) occurred relating to personal property, but the same principles apply to realty:—A. by will gave all his property to his daughter I. on condition that she paid to the four daughters of his brother J. "four hundred pounds out of seven, now lying in the £3 per Cent. Consolidated." It was held, that the legacy to the four daughters, being without words of severance, created a joint tenancy therein, and that the whole survived to M., the surviving daughter. In giving judgment, Sir R. P. Arden, M. R., said:—

"Great doubts have been entertained by Judges, both at law and in equity, as to words creating a joint tenancy or a tenancy in common; and it is clear the ancient law was in favor of a joint tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning of the Courts lately in favor of a tenancy in common. A legacy of a

(*o*) *Ib.* 263 *et seq.*
(*p*) Vol. ii. p. 191.
(*q*) *Morley* v. *Bird*, 3 Ves. 629; and Tudor's L. Ca. on Real Prop. p. 876.

Chap. VIII.

specific chattel, a grant of an estate, is a joint tenancy. It is true, the Courts, seeing the inconvenience of that, have been desirous, wherever they could find any intention of severance, to avail themselves of it: and their successive determinations have laid hold of any words for that purpose. 'Equally to be divided,' 'equally, among, between,' even in law I believe, certainly in equity, create a tenancy in common; but without those words it is a joint tenancy" (*r*).

And again, in another case previously referred to (*s*), Page Wood, V.C., stated:—

"It was said that the inclination in equity has been to favor tenancies in common and not joint tenancies. The Court has so far done this as to say, that, where it finds slight words of intention of severance, the course is to act upon them; but where the words are such as to create a joint tenancy, that must be taken to be the real intent of the conveyance, unless there is some distinct ground to prevent its operation."

Form of creation by deed.

The usual mode of creating a tenancy in common by deed is to limit the estate to two or more persons 'as tenants in common' (*t*)—*e.g.*, to A. B. and C. D. their heirs and assigns as tenants in common. Now that, under the Conveyancing and Law of Property Act, 1881, it is not necessary to express words of inheritance, but 'in fee simple' or 'in ~~fee~~ tail' are sufficient, the form will be—to A. B. and C. D. in fee simple (or in ~~fee~~ tail) as tenants in common (*tt*).

Cross-remainders.

When lands are given in undivided shares to two or more persons for particular estates, so as that, upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the remainderman or reversioner is not let in till the determination of all the particular estates; then the grantees take their original shares as tenants in common, and the remainders limited among them, on failure of the particular estates, are known by the appellation of 'cross-remainders.' But no technical words are required to create cross-remainders: any form of words which sufficiently indicate the intention of the parties will be sufficient for the purpose (*u*).

The following form is frequently used in a settlement: the property is conveyed to the trustees to uses of the husband for

---

(*r*) Generally as to what will give a joint tenancy by deed or will, and what a tenancy in common, see Mr. Tudor's notes to *Morley* v. *Bird*, p. 876.

(*s*) *Kenworthy* v. *Ward*, 11 Hare, 204; *ante*, p. 231.

(*t*) 2 Da. i. 333.

(*tt*) 44 & 45 Vict. c. 41, s. 51.

(*u*) 4 Cru. Di. 459; and see Co. Litt. ed. by Thomas, vol. i. p. 774, note.

life, and the wife for life, and after to uses in favor of their issue, according to appointment, and in default of and subject to any such appointment—

"To the use of all the children of the said intended marriage and the heirs of their respective bodies in equal shares as tenants in common And if and so often as any such child shall die without issue then as well as to his or her original share as also as to the share or shares that shall have survived or accrued to him or her or to the heirs of his or her body To the use of the others of such children and the heirs of their respective bodies in equal shares as tenants in common And if all such children but one shall die without issue or there shall be but one child of the said intended marriage then as to the entirety of the same premises To the use of such one or only child and the heirs of his or her body And in default of such issue To the use of the said A B his heirs and assigns for ever" (*x*).

It is a fundamental rule that cross-remainders cannot be implied in a deed, but in a will they may be raised by implication, on the ground that, the testator being *inops concilii*, by construction his words ought to be made to answer his intent appearing in other parts of the will as near as may be (*y*).

Partition. Dower. Curtesy.

What has been said in respect of partition of a joint tenancy applies equally to a tenancy in common. But lands held in common, unlike those in joint tenancy, are subject to dower and curtesy.

Covenants by and with tenants in common.

Reference has been made to the covenants for title usually entered into by joint tenants on a sale of lands by them. Tenants in common enter into similar covenants, but with this difference in form, that they are expressed to be "so far only as relates to the (*e.g.*) one equal undivided fourth share of which he claims to be seised and to his own acts, &c." (*z*). When the tenants in common are covenantees, the covenants should be entered into with them severally (*a*).

Joint tenants and tenants in common. Waste.

By Statute of Westminster the Second (*aa*) the action of waste was given to one tenant in common of the inheritance against another making waste in the estate held in common. The equity of this estate, it was said, extended to joint tenants but not to coparceners, because by the old law they might make partition,

(*x*) See Da. C. P. (11th ed.) 400; see another Form under a Will, p. 486.

(*y*) See Co. Litt. ed. by Thomas, vol. i. p. 774; and notes to *Gardner* v. *Sheldon*, Tudor's L. Cs. on Real Property, p. 625.

(*z*) See 2 Da. i. 250. *Ante*, p. 238.

(*a*) 1 Da. 117; and see form 2 Da. i. 333.

(*aa*) 13 Ed. I. c. 22.

Chap. VIII.

and thereby prevent future waste, but tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any further waste (*b*). As between tenants in common or joint tenants, a Court of Equity will not grant any injunction against committing waste, unless the waste be what is called voluntary, that is, positive and actual destruction, as cutting trees not fit to cut (*c*); and one tenant in common (it has been decided, and doubtless a joint tenant) may get, or licence another to get, minerals under the property; only he must not appropriate to himself more than his proper share of the proceeds, which is matter of account, and that is the only remedy which will be granted (*d*). Under the Judicature Act, 1873 (*e*), such account must be obtained in the Chancery Division of the High Court; this provision practically repeals 4 Anne, c. 16, s. 27, which gave a right of action of account to one co-tenant against another.

(*b*) 2 Inst. 403, 404; Co. Litt., ed. by Thomas, vol. iii. 244, note.

(*c*) *Twort* v. *Twort*, 16 Ves. 131.

Ante, p. 47.

(*d*) *Job* v. *Potton*, L. R. 20 Eq. 84.

(*e*) 36 & 37 Vict. c. 66, s. 34, § 3.

CHAPTER IX.

USES AND TRUSTS.

HAVING considered the extent of the various interests capable of being possessed in real property, both as regards quantity and quality, we now proceed to a subject to which occasional reference has already been made, and which occupies a prominent place in the English law of property, viz., the Statute of Uses.

I. The law before Statute of Uses.

At the very threshold of the subject, and essential to the just apprehension of it, and of much else in the principles and practical application of our law of real property, is a clear understanding of the nature and meaning of a legal 'seisin,' and the distinction between what are termed 'legal' and 'equitable' estates.

Seisin—Legal estate.

A feud, as we have seen (*a*), was originally conferred by the words '*dedi et concessi*,' which were afterwards the operative words in a feoffment, as a conveyance or transfer of lands from one holder to another, was called. The gift or grant was perfected by 'investiture,' a ceremony which consisted in putting in possession, actually or symbolically. This, in like manner, became necessary to the feoffment. Such delivery of possession was called 'livery of seisin.' The object of this notoriety was, that the lord might always know to whom he might apply for the services due from the tenant, and for the profits arising from such incidents of tenure, as aids, reliefs, heirships, descents, or forfeitures (*b*).

Courts of Common Law.

In the ancient simplicity of the common law, and under the influence of feudal notions, the ordinary, and what were termed accordingly, the Common Law Courts of the country, recognised in relation to land or immovable property, no other ownership than that which was either conferred originally by the formality of a feudal grant or enfeoffment, or transferred from one holder to another by a corresponding solemnity. An ownership must have

(*a*) *Ante*, p. 20.
(*b*) Tudor's L. Ca. on Real Prop. 336

Chap. IX.

been created with formal delivery of possession of the lands—'livery of seisin,' and in the case of its transfer transferred in like manner; otherwise, the Courts held it no ownership at all, and awarded to a possessor no title to the property. Let the person in the seisin (called the 'terre-tenant') hold that seisin beneficially for another; let him have even parted with his interest to another for a valuable consideration—say, have sold it and received the price; let him have acknowledged that he held the estate not for his own use but for another; still, so long as the actual seisin remained in him, without having been divested by the requisite formal assurance, the Court treated the estate and its ownership as vested in him, and not only refused to look for an interest beyond that seisin, but would even shut its eyes to its existence when shown. To such a length indeed was this carried, that were the rightful owner—he for whose benefit the estate was held—in the actual possession of the land itself, he would be treated as holding it at sufferance only to him who, after all, was but its nominal owner; while, if out of possession, the beneficial owner would be regarded as an entire stranger (*c*).

Court of Equity.

There arose in process of time another Court holding a jurisdiction beyond the ordinary Common Law Courts, namely, the Court of Equity. This recognised the beneficial interest, and gave effect to it by calling upon the party with whom the seisin rested to discharge the obligation under which he held it; but to obtain this redress, resort to this special Court became necessary. Notwithstanding the establishment of this equitable jurisdiction, the Courts of Common Law still pursued their ancient course, and recognised only the legal seisin, leaving the beneficial interest to be dealt with in a Court of Equity.

High Court.

Now by the Supreme Court of Judicature Act, 1873 (*d*), the jurisdictions, both of the Courts of Common Law and of the Court of Equity, were transferred to the High Court, and it was enacted that:—

> S. 25, § 11. "Generally in all matters, not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

As to County Courts, the Judicature Act, 1873 (*f*), provides as follows:—

> S. 89. "Every inferior Court which now has, or which may, after

(*c*) 2 Bl. 328. (*d*) 36 & 37 Vict. c. 66, s. 25, § 11. (*f*) 36 & 37 Vict. c. 66, s. 89.

the passing of this Act, have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

'Getting in' legal estate.

In the action of ejectment (*g*), where the relation of landlord and tenant between the parties did not exist, the plaintiff could only recover by showing in himself a good and sufficient legal title (*h*). Hence, the necessity then of 'getting in' the legal estate. But now the main object of getting it in is as a protection against mesne incumbrances; for, notwithstanding the provisions of the Judicature Act (*hh*), the distinction between the legal and equitable estate has continued to exist.

Equitable estate.

It is the ownership thus alone recognised in the Courts of Common Law, which is termed the 'seisin' or 'legal estate.' The beneficial interest admitted and dealt with in a Court of Equity, is termed the 'equitable estate.'

Thus, let us suppose A., the party in the legal seisin, to have even executed a declaration acknowledging in the plainest terms that, though true it was the seisin was in him, yet nevertheless the property belonged in fact to B., and that he, A., only held as a trustee for him, B.; yet were B., wrongfully kept out of possession, to have brought an action in a Court of Common Law for the recovery of the land (and the action of ejectment would have been the ordinary one for the purpose), the action would necessarily have failed, because the legal estate, to which the common law would attach the right of possession, would be in A., and not in B., and the acknowledgment would have created nothing against the legal seisin. B.'s only remedy would have been in equity; and even then, all that the Court could have done would have been, not to award the possession to B., but to direct A. to place B. in his, A.'s own position—namely, to order him to execute a conveyance of the estate to B., or as he should direct, and to account to him for the mesne profits;

(*g*) Abolished as regards the High Court by Judicature Act. *Ante*, p. 3.

(*h*) Broom's Commentaries, 755. *Ante*, pp. 189, 191.

(*hh*) 36 & 37 Vict. c. 66, s. 25.

Chap. IX.

and it would not have been until after this conveyance to B. had been executed, and B. had by its means succeeded to the legal ownership or estate, that he could have proceeded with effect in a court of law to recover the possession.

The nature of these two estates, legal and equitable, is thus well described by Mr. Hayes (*i*) :—

> "Thus, there existed two distinct kinds of proprietorship, the subject of distinct modes of alienation, and the objects of distinct jurisdictions. The vulgar notion of 'Equity' is that of a mild and liberal tribunal, tempering the austerity of the Law. The correct legal notion, with reference to the subject before us, is that of a judicature peculiar in its constitution, searching the conscience, and acting against the person of an individual intrusted with the keeping of the land, as distinguished from a judicature consulting the common law, and awarding possession of the land itself."

Use.

The purpose for which property was thus held by the feoffee, was termed, somewhat indiscriminately, a 'use.' Lord Coke defines the use as—

> "A trust or confidence which is not issuing out of land, but as a thing collateral annexed in privity to the estate and to the person touching the land; *scil.*, that *cestui que use* shall take the profits, and that the tertenant (*i.e.*, the feoffee) shall make estates according to his direction. So that he who hath an use hath not *jus neque in re neque in rem*, but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it" (*k*).

The severance of the actual from the nominal ownership, coupled with the resolute ignoring on the part of the Common Law Courts of the country of all else than the legal seisin, had given rise to great mischiefs, and to much contravention of the general policy of the law.

Origin of Uses. Mortmain.

One of the earliest exhibitions of this, and which probably led to the introduction of the whole system, was a device which sprung up in evasion of the Statutes of Mortmain. The Church, finding itself incapacitated by these statutes from taking from its pious adherents direct grants of their lands, had resort to the contrivance of having conveyances made to a third party to the use of or in trust for themselves. Though incapacitated from

(*i*) Popular View of the Law of Real Property, p. 26.

(*k*) 1 Co. 121*b*; see Tudor's L. Ca. on Real Prop., notes to *Tyrrell's Case*, 337.

acquiring a legal ownership of the property, the Church thus secured to itself the enjoyment of it. In the particular instance of the Church, the device was, as we have seen, crushed almost in its infancy by the Statute of Richard II., which enacted that for the future uses should be subject to the Statutes of Mortmain, and forfeitable like the lands themselves, unless a licence from the Crown to hold them were obtained (*kk*). But the example thus set was not lost in reference to other exigencies.

Wills.

Thus, down to the reign of Henry VIII., when the Statute of Wills (*l*) was first introduced, testamentary disposition was prohibited as at variance with the spirit of the feudal system; but the prohibition was (as we have seen (*ll*)) evaded by the practice which sprung up of conveying lands to be dealt with according to the disposition of the owner, or as it was termed, 'to the use of his will'; and, although the will would not operate on the lands, it governed the use.

To avoid attainder.

So, again, in the civil commotions which were rife in the earlier periods of English history, a wholesale forfeiture for treason was the general result of the success of one of the two great contending parties over the other. Those, therefore, who played the game of contending factions, with its doubtful issue of failure and consequent attainder, would take the precaution, before they engaged in the strife, of preventing the consequences of a forfeiture for treason, by withdrawing their lands from their own visible and ostensible ownership, and placing them in those of others who would nevertheless hold them to their use.

Burdens of tenure.

This mode of dealing with the land was also found a convenient way of avoiding the ordinary burthens of a feudal servitude, and sometimes, too, of defeating even the claims of creditors; for, says Mr. Hayes:—

> "The use being the creature of conscience, the offspring of moral obligation, it could not be the subject of 'tenure'; it could yield no fruits, and owe no duties to the lord, it was not liable to forfeiture, nor susceptible of livery (*m*).
>
> * * * * * *
>
> "So ready a method of eluding the yoke of 'tenure' could not but prove highly valuable to the people struggling with the narrow doctrines of the common law, and groaning under the oppression of wardships, marriages, reliefs, escheats to the lord, escheats to the Crown on at-

(*kk*) *Ante*, p. 92.
(*l*) 32 Hen. VIII. c. 1.
(*ll*) *Ante*, p. 88.
(*m*) Hayes, 22.

Chap. IX.

tainder, and other feudal inflictions—all of which were evaded by this subtle invention (*n*). * * * *

"As it neither required, nor admitted, of a conveyance, it might be disposed of by a secret contract, and even by word of mouth" (*o*).

And, says Blackstone :—

"A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it."

(*Contra.*)

But on the other hand, the beneficiary was often exposed to the loss of his estate from causes over which he had no control. For, as Blackstone (*p*) tells us :—

"Originally it was held that the Chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration or with an express notice of the use. But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king nor queen, on account of their dignity royal, nor any corporation aggregate, on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife who was assigned her dower, were liable to perform the use; because they were not parties to the trust, but came in by act of law: though doubtless their title in reason was no better than that of the heir."

Uses, how created.

Expressly.

The ordinary mode of creating a use was by a conveyance to a party, with a direction, either oral, or expressed on the deed itself, that he was to stand seised of the lands to the uses indicated.

By implication.

But uses sometimes arose, not by actual creation in terms, but by legal implication. Thus Mr. Hayes says (*q*) :—

"Uses were further distributable into 'express uses,' created by the declaration of the parties; 'constructive uses,' arising by the construction of the equitable Judge, who looked at the nature and object of the transaction; and 'resulting uses,' which were analogous to the 'reversion' of the common law. If A. conveyed land to B. 'to the use of C.,' the benefit belonged, by the terms of the conveyance, to C., who

(*n*) Hayes, 29.
(*o*) *Ib.* 31.
(*p*) Vol. ii. 329.
(*q*) Pop. View of Law of R. P. 29.

had an 'express use.' If A. conveyed land to B., subject to a condition avoiding the conveyance on payment by A. to B. of a sum of money at a given time, B., on non-payment of the money, became, to all intents, the legal owner of the land; but that which at law was an absolute alienation, equity regarded as merely a pledge, and treated B. as holding the land, charged only with the liquidation of the debt, to the use of A., who had, therefore, a 'constructive use.' If A. conveyed land to B., 'to the use of C. for life,' without more, then, if nothing appeared from which it could be inferred that B. was to retain the land for his own benefit after the death of C., the 'use' of the land, after C.'s death, returned to A., the former owner, who was said to have a 'resulting use.' Equity, in short, administered the 'use,' or beneficial interest, according to conscience; holding it unconscientious that the land should be retained by a lender, after satisfaction of the debt, or by a grantee in whose favor no use was declared, or could reasonably be presumed."

Equity following, and not following the law.

In dealing with the interests thus created, when relief was sought in the Court of Equity, the principle was to a certain extent to assimilate the equitable to the legal ownership, and to treat the legal ownership as practically held for the benefit of the real beneficiary. Thus, uses were descendible according to the rules of the common law, in the case of inheritances in possession (*r*). But concurrently with this, the Court of Equity so far at times contravened the principles of the common law, that it disregarded some of the stricter results of the feudal seisin, and allowed, as incidents of the equitable ownership, properties not only not recognised by, but at variance with, the stricter and more technical rules of the common law.

We have already adverted to the power of disposition by will over the use, to its power of assignment by secret deed, to its freedom from liability to the feudal burthens, to its incapacity of being extended by writ of *elegit*, or other legal process for the debts of *cestui que use* (*s*). Again, at common law estates could only be limited in possession, or by way of remainder (*t*); according to which, upon the natural determination of the prior estate, the succeeding estate must, if at all, instantly take effect (*u*). By means of uses, however, an estate might be made to take effect in derogation of the former estate, without awaiting its natural determination. These were termed 'shifting' or 'springing' uses.

(*r*) 2 Bl. 330.
(*s*) *Ante*, pp. 249, 250.
(*t*) *Ante*, pp. 211, 215 *et seq.*
(*u*) But see now 8 & 9 Vict. c. 106, s. 8, repealing 7 & 8 Vict. c. 76, s. 8, to the same effect; and 40 & 41 Vict. c. 33. *Post*, p. 262.

Chap. IX.

Consequent inconveniences.

Though these uses had an equitable beginning, yet, "like all new models of general schemes of ordering of property," they introduced so many unforeseen inconveniences (*uu*), that Lord Bacon complained that—

> "This course of proceeding was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease" (*x*).

Partial remedies.

For some of the inconveniences pointed out partial remedies had, prior to the Statute of Uses, been afforded by particular statutes. Some of these allowed the lands to be attached by the creditors of the *cestui que use;* others allowed actions to be brought against him if in actual possession, that is, in the 'pernancy,' or enjoyment of the profits; and some made him liable to actions of waste, established conveyances and leases made with the concurrence of the feoffee, and gave to the lord the wardship of the heir (*y*).

These, however, were but partial and imperfect remedies; still their provisions all pointed to the treating the *cestui que use* as the real owner of the estate, and a statute passed on the accession of the Duke of Gloucester to the Crown, as King Richard III., furnished a hint for their extension, afterwards carried out by the Statute of Uses. King Richard, when Duke of Gloucester, had been a feoffee of lands to the use of other parties to a large extent, and which, on his assumption of the Crown, he would (as the law was then understood) have been entitled to hold to himself discharged from the uses. To obviate this, an Act was passed, which ordained that where he had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees, as if he had never been named; and that where he stood solely enfeoffed, the estate should vest in the *cestui que use,* in like manner as he had the use (*z*).

The latter provision furnished the principle for, and was more amply carried out by the celebrated Statute of Uses, which passed in the 27th year of the reign of Henry VIII., the object of which

---

(*uu*) Bacon's Abridg. Tit. Uses, p. 83.
(*x*) 2 Bl. 331.
(*y*) 2 Bl. 332.
(*z*) *Ib.*

statute evidently was, by uniting the legal seisin or interest to the equitable or beneficial interest, entirely to abolish the doctrine of Uses and Trusts (*a*).

II. Statute of Uses.

By that statute, after reciting in the preamble the various inconveniences pointed out above (*b*), it was enacted :—

S. 1. "That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust, of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be, that in every such case all and every such person and persons and bodies politic, that have or hereafter shall have any such use, confidence,

---

(*a*) 27 Hen. VIII. c. 10. See Tudor's L. Ca. R. P., notes to *Tyrrell's Case*, p. 340.

(*b*) The preamble was as follows:— "Where by the Common Laws of this realm, lands, tenements, and hereditaments, be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide* without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret uses, intents, and trusts; and also by wills and testaments sometime made by *nude parolx*, and words, sometime by signs and tokens, and sometime by writing; and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance, at which times they being provoked by greedy and covetous persons, lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier*, and *pur file marier*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions, or execution, for their rights, titles, and duties; also men married have lost their tenancies by their courtesy, women their dowers; manifest perjuries by trial of such secret wills, and uses, have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in anywise hereafter, by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses, or confidences."

Chap. IX.

or trust in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence, or trust in remainder, or reverter, shall from henceforth stand, and be seised, deemed, and adjudged in lawful seisin, estate, and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence, of or in the same; and that the estate, title, right, and possession, that was in such person or persons, that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust that was in them" (*c*).

Thus, under a feoffment to A. to the use of B., the statute enacts that B. shall have the seisin and possession, and then, by a second limb, declares that A.'s legal estate and possession shall be deemed and taken to be in B. in the same condition as B. had previously in the use (*d*).

"The statute," says Blackstone (*e*), "thus 'executes' the use; that is, it conveys the possession to the use, and transfers the use into possession: thereby making *cestui que use* complete owner of the lands and tenements as well at law as in equity."

Construction of statute.

1. Applies only to one seised of real estate.

It will be observed that the statute, in defining the class of persons holding property to the use of other persons, speaks only of a person or persons 'seised.' Now seisin is an expression applicable only to real estate, and not to personalty, in reference to a holding of which 'possession' and not 'seisin' is the appropriate and recognised expression. In accordance with this, the statute was, very early after its introduction, held to be confined to freehold lands, as distinguished from chattels real; and therefore in the case of one possessed of a term of years, held by him in fact in trust for or for the use of another, the statute would not apply, and the term would remain vested in the possession of the holder subsequently to the statute; in the same way as it would have done before it; though a person might stand seised of the freehold to the use of another for a chattel interest—as A. B., being seised in fee, might covenant to stand seised to the use of C. D. for years, and such use would be executed by the statute (*g*).

(*c*) Sanders on Uses, p. 71.
(*d*) Watkins, 231, note.
(*e*) Vol. ii. 333.
(*g*) Watkins, 233.

2. And to the benefit of another.

Another peculiarity should also be pointed out, namely, that the statute mentions only the instance in which the legal seisin is in one person, and the beneficial ownership in another, and when they are united in the same individual,—in the language of the statute, "where any person stand or be seised, &c., to the use, &c., of any other person." But where one person is seised to his own use, there the statute does not apply, and the party would be in the possession as of his original legal seisin; such use is not executed by the statute, but he is in by the common law (*h*).

Yet conveyance unto and to the use of grantee.

Notwithstanding this, it is customary to convey 'unto and to the use' of the grantee, for the following reasons, as expressed by Mr. Davidson:—

"Where there is on the face of the conveyance a consideration expressed for it, a limitation to the purchaser and his heirs without any declaration of a use, will confer a fee simple; but before the Statute of Uses the rule was, that any conveyance made to another without any consideration or any declaration of a use, should be deemed to be made to the use of the party conveying; and it has been supposed that this rule has not been altered by the statute. In order to avoid any such construction, and to prevent the Statute of Uses from immediately undoing all that has been done, it is usual in every conveyance, and whether made for a consideration or not, to limit the land to the use of the purchaser, his heirs and assigns, or to such uses as he shall appoint, and in default of appointment to uses which practically vest the fee simple in him" (*i*).

Conveyance by a man to the use of himself, &c.

Advantage was taken of the statute applying to the case of one being seised to the use of another, to enable a man to convey to himself a freehold in severalty or in joint tenancy, or to his wife (which at common law, she being considered the same person with him, he could not do), and a wife to convey to her husband; namely, by conveying to another person to the use of the person or persons intended to take, *e.g.*, a man settling land upon himself for life, a surviving trustee vesting the trust estate in a new trustee jointly with himself. Says Mr. Davidson (*k*):—

"The interposition of a stranger as a grantee to uses enables a man to convey a freehold estate to himself or his wife, and a wife to convey a freehold estate to her husband; whereas, previously to the Statute of Uses, in consequence of the rule of the common law, that a man cannot take an estate by his own conveyance—*i.e.*, unite the opposite characters of grantor and grantee, two conveyances would have been necessary. It would have been requisite for him to convey to a third

(*h*) Sanders on Uses, p. 89. (*i*) 2 Da. i. 182. (*k*) Vol. ii. pt. i. 184.

Chap. IX.

person, and for that third person to reconvey it to him: a method which, prior to the Act 22 & 23 Vict. c. 35, s. 21, was necessarily adopted under similar circumstances with respect to leasehold estates, since they are not affected by the Statute of Uses. The practical benefit thus derived from the Statute of Uses is seen in the familiar instances of a man settling his own freehold on himself for life or in tail, and of a surviving trustee limiting the estate to the use of himself and new trustees" (*l*).

Conveyancing Act, 1881.

Now, by the Conveyancing and Law of Property Act, 1881 (*m*), it is enacted, as supplementary to 22 & 23 Vict. c. 35 (*n*), s. 21, which applies only to personal property, that freehold land (or a thing in action) may, after 31st December, 1881, be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

3. And use co-extensive with feoffee's estate.

The use, too, can only be co-extensive with the estate of the feoffee. In other words, *cestui que use* cannot have an estate in the use more extensive than the seisin out of which it is raised. Thus, if land be conveyed to A. for life, to the use of B. for life, in tail, or in fee, the estate of B. must determine upon the death of A. (*o*). Hence arose much controversy on the question out of what seisin contingent uses were in certain cases to be executed, as, for instance, a conveyance to a trustee and his heirs to the use of the settlor and his heirs till marriage and after to other uses, *e.g.*, to the use of his son for life with remainders over—the use co-extensive with the seisin of the trustee was executed by the statute, and so no actual seisin remained in him after the marriage; it was said, however, that the original seisin reverted to him for the purpose of serving the secondary uses, and that before such event this possibility of reverter of the original seisin should be considered as a 'possibility of seisin' or *scintilla juris* (*p*). Others held that the seisin to serve the contingent uses was *in nubibus, in mare, in terrâ*, or *in custodiâ legis*. Lord St. Leonards advocated the opinion that the contingent uses took effect as they arose, by force of and relation to the seisin of the

—*Scintilla juris.*

(*l*) Formerly conveyance to a provisional trustee was necessary, followed by conveyance from him to new trustees.

(*m*) 44 & 45 Vict. c. 41, s. 50.

(*n*) Lord St. Leonards' Act to Further Amend the Law of Property, 1859.

(*o*) Sanders on Uses, p. 107.

(*p*) *Ib.* p. 108.

feoffee—the estates opened and let in the contingent uses as they came *in esse* (*pp*). This last view was adopted in the Act to Further Amend the Law of Property, 1860 (*q*), which enacted :—

> S. 7. "Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

Object of statute defeated.

We have seen, in the instance of the statute *De Donis*, how entirely its object was ultimately defeated by legal device and legal construction (*qq*). So, in the case of the Statute of Uses, although its grand design was to put an end to the system of severance of the beneficial from the legal ownership, and to unite the two in the same individual,—virtually to abolish uses by turning them into legal estates,—to "marry" the use indissolubly to the land, and thus restore in effect the singleness and simplicity of the common law (*r*); the whole scheme of the statute was frustrated by legal ingenuity and contrivance sanctioned by judicial decision.

No use upon a use.

The statute, it has been observed, interfered in the instance only in which, taking its literal terms, one person was seised to the use of another; and in that case it declared that the person who had the use, should be deemed to be "in lawful seisin, estate, and possession," of the lands. The contrivance resorted to in order to obviate the effect of this, and at the same time to create an ulterior beneficial interest apart from the legal one, was to make a conveyance of the lands to one to the use of another, and then to go on to declare that that other should hold it upon trust for the party for whom the beneficial interest was designed. Thus the property was conveyed to A. to the use of B. in trust for C. Under this arrangement A. played the part of what was

(*pp*) Sugden on Powers, ch. i. sec. 3.
(*q*) 23 & 24 Vict. c. 38, s. 7.
(*qq*) *Ante*, pp. 65 *et seq.*
(*r*) Hayes' Popular View of Law of Real Property, 32.

Chap. IX.

termed a 'conduit-pipe,' that is, was a person momentarily only receiving the seisin; this seisin, at the same instant of time, the statute withdrew from him and transferred to B., under its enactment that, where one person was seised to the use of another, that other should thenceforth himself be deemed to be in lawful seisin. Having thus transferred the seisin to B., according to the construction, shortly after the passing of the statute, put by the Courts on the matter, it left it there; yet B., while he got the estate himself, only held in trust for C. This second trust, however, that for C., was not considered as being the trust or use on which A. held the lands. The Court adhered to the literal terms of the statute, which only executed the use to which one person was seised for another, and in the instance in question the use to which A. was seised was one for B., and not one for C. Therefore, as was observed by Lord Hardwicke (*s*), the result of this celebrated statute was only to add three words to a conveyance, namely, 'to the use,' that is, instead of conveying to A. to the use of or in trust for C., the conveyance was made to A. to the use of B., in trust for C.

The foundation of the judgment of the Court was, that there could not be a use upon a use, which it was said would have been the result had the Court executed the double use, namely, first that to B., and then that to C., instead of confining itself to the single one, the use to B.;—a doctrine which is said to have been founded less on the substantial good sense of the case, than on the subtlety of scholastic logic, which was prevalent at the time and in the Courts of Law as well as elsewhere. It was decided in the reign of Philip and Mary (*u*). The case was, Jane Tyrrell, by bargain and sale enrolled, granted to her son G., all her manors, &c., to hold to the said G. and his heirs for ever, to the use of herself for life, and after her decease to the use of G. and the heirs of his body lawfully begotten; and for default of such issue to the use of her own right heirs. The law being that when a man bargains and sells his land for money, he thereby raises a use by implication to the bargainee, which the statute executes in him (*x*), it was held that the use, being executed in G. by the statute, the uses in the *habendum* were void; there could not be a use upon a use.

(*s*) Hayes, 35.

(*u*) *Tyrrell's Case*, see Tudor's L. Ca. R. P. 335.

(*x*) 2 Bl. 335.

Thus says Mr. Hayes (*y*) :— Chap. IX.

"It was found that, by a very ready process, the legal estate might be separated from the equitable or beneficial right as before. The things remained; the terms only were changed. The primary 'use,' on which the statute did operate, retained, along with its new character of a legal estate, its ancient appellation of a 'use;' the secondary use, on which the statute did not operate, was called, for distinction's sake, a 'trust.' As the 'use' became, henceforth, by the effect of the statute, essentially the legal estate in the land, it ceased to be the creature of equity, and fell under the ordinary cognizance of the Courts of Common Law."

Person enfeoffed having active duties to perform, not seised to use.

While the Courts of law thus refused to extend the operation of the statute beyond the first use of a series, they at the same time refused to treat as a use at all the case in which, although ~~there existed~~ an ultimate beneficial ownership in some second party, ~~this~~ was left to be worked out through the means of some active duty to be intermediately discharged by the legal owner. Thus, suppose lands to be conveyed to A. upon trust to recover and receive the rents, and then pay them over to B.; here, inasmuch as the active duty of receipt was cast upon A., the Court left him clothed with the legal ownership, for, it said, the lands must remain in the trustee to enable him to perform the trust: but had the trust in A. been to permit the rents to be received by B., the result would have been the other way. In the latter case, the use would have been executed in B. (*a*).

Trusts.

The practical result of the construction thus put by the Courts of law on the statute, was to restore to the Court of Chancery its ancient ascendancy; the doctrine of uses was revived under the denomination of 'trusts.' That Court held that uses which the statute could not execute were still 'trusts' in equity, which in conscience ought to be performed. And so in the end the Statute of Uses, instead of withdrawing trusts from the control of the Court of Chancery, brought them even more fully within its operation.

To what purposes uses and trusts applied.

The facilities which were thus afforded for creating modifications of property, in accordance with the growing exigencies of the advancing civilisation and wealth of the country, led to the present mode of conveyancing, by which is readily created a series of beneficial ownerships.

Exemplified in

For example, suppose a father to desire, on the occasion of

(*y*) Popular View of Law of Real Property, p. 36. (*a*) 2 Bl. 336.

Chap. IX.

marriage settlement.

marriage, to settle a particular property on one of his children, say an eldest son, after the manner of what is called a 'strict settlement,' the course would be after this fashion:—

A conveyance would be made to trustees, say, to A. and B. and their heirs, and then they would be directed to hold to the use of the father and his heirs until the marriage, and after the marriage to the use of the son for his life, with remainder after his death to the use of trustees for a long term of years (say 500) upon trust to raise a jointure or annuity by way of maintenance for the widow of the son for her life, and also to raise by a mortgage or sale of a competent part of the lands a sum of money by way of provision for the younger children, under the name of portions, to be divided on their attainment of majority, or as to daughters, marriage, with provisions for their intermediate maintenance, and then, subject to this term, to the use of the first and other sons in succession of the son (that is, the grandsons of the settlor according to their seniority) in tail, and failing sons similarly to the use of the daughters successively in tail, and failing both sons and daughters to the use of the father and his heirs, thus bringing the estate back to the settlor (*b*). It will be observed that under such a course of settlement as this, apart from the provisions for the wife and younger children, there would be no reason why the son and his eldest son in succession should not have the legal as well as the equitable ownership in the land vested in themselves, and they would get it under the declaration that the trustees should hold to their uses successively. On the other hand, to enable the trustees to raise the jointure for the wife and the portions for the younger children by sale or mortgage of the property, they must have some legal ownership or estate vested in them for that purpose, and this would be constituted by the creation of the term for 500 years in them.

Construction of Trusts.

'Equity follows the law.'

Contingent remainders—
At law,
In equity.

As in the case of uses before the statute equity in general followed the law, so also did it after the statute in respect of trusts, or, as the interests of *cestuis que trust* were called, 'equitable estates.' But, as before, it did not follow it in all things (*c*); thus, like the use before the statute, it would not allow that the trust estate was capable of forfeiture, for it was wholly independent of tenure, and forfeiture was a punishment for acting con-

(*b*) A form on these lines may be found at 3 Da. ii. 982 and 1030, and another form at p. 408 of Davidson's Conc. Prec.

(*c*) *Ante*, p. 251.

trary to the fidelity due to the person of whom the estate was holden, whereas a trust was holden of nobody. Again, a contingent remainder at law was liable to be defeated by the failure of the particular estate before the happening of the contingency whereby the remainder became vested; this was upon the feudal rule that the freehold could never be vacant, for that there must always be a tenant to render the services to the lord, and therefore if the remainder could not take effect immediately on the determination of the prior estate, it never could take effect at all (*cc*). But this result of feudal rules was never held to apply to equitable estates; for, as the legal estate in the trustees fulfilled all feudal necessities, there being always an estate of freehold in existing persons who could render the services to the lord, there was no reason why the limitations in remainder of the equitable interest should not take effect according to the intention. For instance, suppose the fee vested in trustees on trust for A. B. for life, and after his death on trust for such of his sons as shall first attain twenty-one. By the death of A. B., before any son had attained twenty-one, the son's equitable estate in remainder contingent on his attaining twenty-one would not fail by the destruction of the particular estate, the estate for life, before the contingency happened whereby the remainderman became capable of taking in remainder (*d*); on the other hand, suppose land settled on marriage to the use of A., the husband, for his life, and after his death to the use of the children of his marriage, and A. forfeited his life estate; the provision for the children fell to the ground, for the use limited to take effect as a remainder was not in readiness to come into operation at the moment when the right to the possession under the prior use determined. Settlements must then have been made by means of trusts (*i.e.*, equitable settlements), but that the expedient was hit upon of introducing, immediately after the gift to the use of A., a gift to the use of trustees, their heirs and assigns, who in the event of an act of forfeiture by A., were to enter and preserve the estate during his life for himself and his children. These functionaries, who played a silent and unconscious, though important part in almost every legal settlement, were called 'trustees to preserve contingent remainders,' they taking the legal seisin by means of the statute (*e*).

Trustees to preserve contingent remainders.

(*cc*) *Ante*, p. 217.
(*d*) See *per* Jessel, M.R., *Abbiss* v. *Burney*, L. R. 17 Ch. D. 229.
(*e*) Hayes, 42.

Chap. IX. But the liability to destruction having, as we have seen, been removed by 8 & 9 Vict. c. 106. and 40 & 41 Vict. c. 33, recourse is no longer had to this expedient (*ee*).

Executory interests. Springing or shifting uses.

Another feature of the common law of tenures was, that no substitution, or 'gift over,' was admissible in any other shape than that of a remainder; as, after a gift to the infant child of A., a gift over to the children of B. if the child of A. died under twenty-one (though in this case the rule came to be relaxed in favor of wills, such gifts being termed, as we have seen, 'executory devises' (*f*)), or, after a gift of the fee simple to A., a gift over to B. if he did a given act; and this was upon the same principle, namely, that the tenancy must be always full (*ff*). The law "equally abhorred a future destination," as a gift by A. to B. from Christmas next. These objects, however, were by means of the use effected and supported in equity. Then the statute, "by joining the land to the use, supplied a ready method of creating these shifting and future dispositions at law, as well as in equity" (*g*). Thus, at law, after the statute, could Executory Interests be created, commonly called 'springing or shifting uses.' The most common instance of this is to be found in a settlement on marriage: the property is given to the use of the husband till marriage, and after the marriage to the uses for which the settlement is made (*h*). Another instance is where property is given on the condition of assuming a certain name and arms: in such case, it is provided that if the condition is not fulfilled, the limitation of it to the use of the person so to take shall determine, and it shall go to the use of such other person as in the instrument provided (*i*).

It was, however, a maxim of law, that no limitation should be considered as executory, which might be good as a remainder (*k*). And this doctrine prevailed until so recently as 1877, when a statute to which reference has been previously made, was passed (*l*).

Contingent remainders now take

It will be remembered, that by the Act to Amend the Law of Real Property (*m*) contingent remainders were protected against

(*ee*) *Ante*, pp. 217, 218.
(*f*) *Ante*, p. 221.
(*ff*) *Ante*, pp. 212, 221.
(*g*) Hayes, 41.
(*h*) *Ante*, p. 260. See form, 3 Da. ii. 84.
(*i*) *Ante*, p. 173. See further instance in *Hervey-Bathurst* v. *Stanley*, L. R. 4 Ch. D. 251.
(*k*) *Doe* d. *Harris* v. *Howell*, 10 B. & C. 197.
(*l*) 40 & 41 Vict. c. 33. *Ante*, p. 218.
(*m*) 8 & 9 Vict. c. 106, s. 8. *Ante*, p. 217.

effect as executory interests.

the destruction of the preceding particular estate, as by merger or surrender; but, as expressed by James, L.J. (*n*), they were "still left to die with the death of such estate through an inherent defect in their original constitution."

Recently arose a case where the intention of the testator was defeated by the inattention of the draftsman to the rule, that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, in other words, a contingent remainder would fail where there was not a preceding freehold estate continuing to exist up to the happening of the contingency on which the remainder was to vest (*o*). In that case (*oo*), a testator devised a moiety of his real estate to A. and B. and their heirs, to the uses and upon and for the trusts and purposes thereinafter mentioned —namely, to the use of A. and B., their executors, administrators, and assigns, for 120 years, if S. C., the wife of J. C., should so long live, and subject thereto, to the use of J. C., for life, with remainder to A. and B. and their heirs during his life, upon trust to preserve contingent remainders; with remainder to the use of all the children of J. C. and S. C. who should be living at the decease of the survivor of them, and the issue then living of such of the children as should be then dead, and the respective heirs and assigns of such children and issue, as tenants in common. J. C. died in the lifetime of S. C. It was held that the intention of the testator was to create a succession of legal limitations, and therefore the contingent remainder to the children failed for want of an estate of freehold to support it.

In consequence of this a short Act was passed (*p*) to prevent a similar result in respect of any instrument executed after its passing—namely, 2nd August, 1877. It enacts:—

> S. 1. "Every contingent remainder, created by any instrument executed after the passing of this Act or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking

(*n*) *Cunliffe* v. *Brancker*, L. R. 3 Ch. D. 407.

(*o*) *Ante*, p. 215.

(*oo* *Cunliffe* v. *Brancker*, L. R. 3 Ch. D. 393.

(*p*) 40 & 41 Vict. c. 33.

Chap. IX.

effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise, or other executory limitation" (*s*).

Restriction on executory limitations.

The provision of the Conveyancing Act, 1882 (*t*), restricting the effect of executory limitations, has been already noticed (*u*).

Creation and assignment of trusts.

Previously to the Statute of Frauds, a trust might have been created by mere verbal direction. That statute, however, enacted:—

> S. 7. "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect" (*x*).

Trusts arising from any conveyance of land "by the implication or construction of law," or trusts "transferred or extinguished by an act or operation of law," are expressly excepted from the statute. A trust falling within the exception would be such, for example, as the law would imply, on the purchase of property by one in the name of another, in favor of him who paid the money. So a mortgagee, after satisfaction of his mortgage, would by legal implication be a trustee for the mortgagor; and various other illustrations might be furnished. It was further enacted by the same statute:—

> S. 9. "That all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise."

There is no particular form required for a declaration or creation of a trust; a mere term of request or recommendation, if the subject and object thereof be precisely stated, will create a trust (*xx*).

Transfer of equitable estates.

In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the assurance of the legal estate; but this is not absolutely necessary (*y*); a writing duly signed, in

---

(*s*) See question raised as to the effect of this Act, in Da. Conc. Pr. 661, note.

(*t*) 45 & 46 Vict. c. 39, s. 10.

(*u*) *Ante*, p. 224.

(*x*) 29 Car. II. c. 3, ss. 7, 8. The declaration of trust must be signed by the beneficial owner (*Tierney* v. *Wood*, 19 Beav. 330; followed in *Kronheim* v. *Johnson*, L. R. 7 Ch. D. 60).

(*xx*) Notes to *Tyrrell's Case*, Tudor's L. Ca. 366, referring to *Harding* v. *Glyn*, White & Tudor's L. Ca. in Eq. vol. ii. 262.

(*y*) Sanders on Uses, 377.

order to satisfy the Statute of Frauds, is all that is necessary, but it is the practice to employ the same form of words in the transfer of equitable as of legal estates (*z*). Except that where the equitable estate is a tenancy in tail, it can only, under the Act for the Abolition of Fines and Recoveries (*zz*), be disposed of in the same manner as a corresponding legal estate; prior to that Act the equitable rights of tenants in tail could only be conveyed by fine or recovery.

Liability of equitable estates to debts generally.

One of the results of putting property into use prior to the statute was, we have seen, to defeat the creditors of the debtor. A statute of the reign of Henry VII. (*a*), however, had provided that where a creditor had obtained an execution for his debt, the execution should attach upon lands of which any other person was seised to the use of his debtor; and this provision, rendered abortive by the construction put as above on the Statute of Uses by withdrawing the seisin from the feoffee, was, in effect, re-enacted by the Statute of Frauds (*aa*), which awarded execution against the lands of the *cestui que trust* in the hands of his trustee. This was under that statute restricted, however, to lands of which the trustee was seised at the time of execution sued, so that a conveyance by the trustee at any time prior to execution, and even subsequent to judgment, would have defeated the execution. But an Act of the present reign, 1 & 2 Vict. c. 110, for extending the remedies of creditors against the property of debtors, made the equitable estate of the debtor at the time of entering up the judgment, or any time afterwards, liable. The effect of this Act has, however, been diminished by 27 & 28 Vict. c. 112, which entirely deprives all future judgments of their lien on real estates. That statute, we have seen (*b*), provides that no future judgments shall affect any land until it have been actually delivered in execution (*c*).

Crown Debts. Bankruptcy.

Equitable estates are subject to Crown debts in the same way as legal estates (*d*), and are similarly liable in the case of the

(*z*) Lewin on Trusts, 594. See for instance the form of conveyance of an equity of redemption, 2 Da. i. 449.

(*zz*) 3 & 4 Wm. IV. c. 74, s. 40. *Ante*, p. 72. Sanders on Uses, 378.

(*a*) 19 Hen. VII. c. 15.

(*aa*) 29 Car. II. c. 3, s. 10.

(*b*) *Ante*, p. 103.

(*c*) As to what amounts to this, see *Ex parte Evans*, L. R. 13 Ch. D. 252. *Ante*, p. 77.

(*d*) By 28 & 29 Vict. c. 104, s. 48, such debts are not to affect the lands unless process of execution has issued and been registered before execution of the conveyance and payment of the purchase- (or mortgage-) money. *Ante*, p. 105.

Chap. IX.

Assets by descent.

bankruptcy of the *cestui que trust*, but on the bankruptcy of the trustee the legal estate remains vested in him (*e*); and they are liable in case of the *cestui que trust* dying indebted, since the Statute of Frauds enacted that a trust in fee simple descending to the heir should be assets by descent (*f*).

Present distinction between Uses and Trusts.

It will appear from what has been said that since the Statute of Uses, and under the construction respecting the execution of the use put upon the statute, uses and trusts have branched out into two different classifications.

The effect of the limitation or grant of lands to one to the use of another is now simply to vest the legal ownership or estate in the *cestui que use*, and the result would be the same if the word 'trust' were substituted for the word 'use,' for example, a grant to A. in trust for B. But when, a legal ownership being vested in one either by means of the statute or otherwise, a trust is engrafted on that ownership, the trust is altogether a different thing,—as in the case of a gift to A. to the use of B. in trust for C., or to and to the use of A. in trust for B.: then a new responsibility is created.

III. Trusts.

1. Active—Passive.

Trusts have been divided into—(1) 'active' and 'passive'; (2) 'executed' and 'executory.'

An Active Trust is, as we have seen, one involving the discharge of some active duty on the part of the trustee. Thus, a trust to raise by sale or mortgage of lands money for the benefit of a given individual, or for a class or classes of individuals; a trust to keep up an almshouse out of the rents and profits of certain property; or a trust to receive and accumulate the income of property for a given period, and at the expiration of the period to divide the accumulations among specified parties, would be all Active Trusts. On the other hand, a trust to hold property to permit A. B. to receive the rents and profits, would be a Passive Trust, or, in the case of a dwelling-house, to allow it to be occupied by C. D. In the former instances the active interference of the trustee is necessary. In the latter he has only to remain passive, and allow the enjoyment to go according to the way indicated.

2. Executed—Executory.

An Executed Trust is when the trust is complete in its creation, and the beneficial interests created under it are defined by the trust itself and are final; in other words, when no act is neces-

(*e*) Bankruptcy Act, 32 & 33 Vict. c. 71, s. 15, § 1; but see s. 117, empowering the Court to remove him from being trustee, and recent case thereon, *In re Adams*, L. R. 12 Ch. D. 634.

(*f*) 29 Car. II. c. 3, s. 10.

sary to be done to give effect to it, the limitation being originally complete (*g*). Thus in the instance of a conveyance to and to the use of A. and his heirs, upon trust for B., for his life, with remainder to C. in fee. The interest to be taken by B. and C. under the trust is defined by the grant itself, and nothing further has to be said or done beyond this—the property is to be held in trust for B. and C. in succession.

An Executory Trust, on the other hand, requires something further to be done to give it complete and final effect,—some further act by the author of the trust or the trustees, to give effect to it, as in the case of marriage articles, and as in the case of a will where property is vested in trustees in trust to settle or convey in a more perfect and accurate manner (*h*). Thus, let property be devised to trustees upon trust to pay the rent to the devisor's daughter for life, and, in the event of her marriage, to make a settlement of it upon her and her children. In this case the trusts for the daughter and her children in the event of her marriage would be executory, requiring something further to be executed, namely the settlement, in order more accurately to define them. Executory trusts usually occur in wills and marriage articles.

In cases of executed trusts, a Court of Equity will construe the limitations in the same manner as similar legal limitations, for there the donor does not suppose any other conveyance will be made; but in cases of executory trusts, where something is left to be done, it will not construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create them (*i*).

3. Declared—Implied.

Again, trusts may be either declared or implied. A Trust Declared is where on the instrument creating it, or some collateral one, the trust on which the property is to be holden is expressly set forth.

A Trust Implied is where there is no positive declaration, but it arises by implication of law. Thus the instances already mentioned of constructive or resulting trusts would be implied merely (*k*). The law of itself would raise them.

Trustees.

Crown or Corporation.

Neither the Crown nor a corporation aggregate could be seised to the old use—that is, the use prior to the statute. Thus, for

(*g*) 1 White & Tudor's L. Ca. in Eq. 18, notes to *Lord Glenorchy* v. *Bosville*.

(*h*) *Ib.*, and see *per* M.R. in *Miles* v. *Hurford*, L. R. 12 Ch. D. 699.

(*i*) 1 Wh. & T. 19.

(*k*) *Ante*, pp. 255, 264.

Chap. IX.

example, if lands were conveyed to the monarch to the use of a subject, or to a corporation to the use of a charity; in the former case the Crown, and, in the latter case, the corporation, might hold discharged of the trust, and for their own benefit. It is different, however, in respect to the modern trust, which would be obligatory in the case either of the Crown or of the corporation (*l*). Instances more frequently occur in relation to corporations where property having been given to them for charitable purposes, their administration of it is called into question. The reason that a corporation could not stand seised to a use was, that the writ of *subpœna* did not issue against it to compel the performance of the trust; a reason which has ceased to operate (*m*).

Alienation and devolution of trust estate.

The alienation or devolution of the estate vested in the trustee —that is, of the dry legal ownership—has followed that of ordinary property. It is capable of alienation by him in his lifetime, and, until recently, might be devised by his will, or, in the absence of testamentary disposition (except in the case of a bare (*n*) trustee), it devolved on his heir.

Now by the Conveyancing and Law of Property Act, 1881 (*o*), it is enacted that in case of death after the 31st December, 1881, where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, is vested on any trust (or by way of mortgage) in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal repre-

(*l*) 1 Sanders on Uses, 56, 87 and 389.

(*m*) 1 Sanders on Uses, 87; Lewin on Trusts, 2.

(*n*) As to the meaning of a 'bare trustee' within 37 & 38 Vict. c. 78, s. 5 (Vendor and Purchaser Act, 1874), and 38 & 39 Vict. c. 87, s. 48 (Land Transfer Act, 1875),—both now repealed by 44 & 45 Vict. c. 41, s. 30 (Conveyancing and Law of Property Act, 1881), —great difficulty has been felt as to what it signifies,—"A difficulty so great," said Jessel, M.R., "that persons of great knowledge and learning, who have paid particular attention to the subject, entertain some doubt as to its meaning" (see *Morgan* v. *Swansea Urban Sanitary Authority*, L. R. 9 Ch. D. 584; *Christie* v. *Ovington*, L. R. 1 Ch. D. 279, Hall, V.C., and Dart's V. & P. 517). The expression also occurs in the Fines and Recoveries Act (3 & 4 Wm. IV. c. 74, s. 31), and in the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137, s. 50). The V.C. (and Mr. Dart) says one who has active duties to perform is not a bare trustee: the M.R. says one who takes a beneficial interest is not: but *quære*, who is? It also occurs in s. 6 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 6, which renders the concurrence of her husband unnecessary to the conveyance by a married woman as "bare trustee."

(*o*) 44 & 45 Vict. c. 41, s. 30.

sentatives in like manner as if the same were a chattel real. The previous legislation as to the devolution of the fee simple on the death of a bare trustee was repealed (*p*).

The alienation of the legal estate *inter vivos* is, as regards all persons taking the property with notice of the trust, and in all cases of succession by representatives, subject in equity to the trust itself and to its paramount obligations. Were, however, a trustee to be acting in fraud, and to convey the estate away to another for value as his own property under circumstances which enabled him to suppress the trust, the trust itself might be defeated. The legal estate and its possession would prevail in law, upon the principles already explained; and the Courts of Equity have declined to interfere when, the equity of the beneficiary and that of the purchaser being, as it is said, equal, the latter had obtained the advantage of the possession of the legal estate (*q*). Hence, again, the necessity insisted on in conveyancing of 'getting in,' as it is termed, the legal estate (*r*).

Notice.
1. Actual.
2. Constructive.

Conveyancing Act, 1882.

But a Court of Equity would not so decline to interfere if the alienee had knowledge, technically termed 'notice,' of the trust. Such Notice may be of two kinds, Actual or Constructive; under either of which fraud will be imputed against the purchaser in equity; so that, as will be seen from what follows, the purchaser may be in fact wholly innocent, and yet in equity will be accounted party to the fraud. Says Mr. Hayes (*s*):—

"If A., having signed a contract for the sale of land to B., but not having conveyed it to him, afterwards sells and conveys it to C., who, at the time of his purchase, is distinctly apprised of the previous sale, C. is said to have 'actual notice' of the equitable right of B. 'Actual notice,' therefore, is clear direct intimation of the fact. But if C. had obtained merely a knowledge of some fact or circumstance (as B.'s possession of the land, or the exercise by him of an act of ownership), which, if investigated or pursued, would have conducted him (C.), either immediately, or through a long train of facts and circumstances, to a knowledge of the contract with B., then C. is said to have 'constructive notice' of the equitable right of B. And if the solicitor or agent employed by C. to negotiate his purchase, receive in the course of the negotiation, either actual or constructive notice, the effect is the same upon the conscience of C., although the agent should never communicate his information, as if C. were personally in the secret. Thus 'constructive notice' to an agent is constructively imputed to the principal.

(*p*) As to extent of repeal, see s. 71 (2).

(*q*) 1 Sanders on Uses, 348 *et seq.*

(*r*) See *ante*, p. 247; also see pp. 189, 191.

(*s*) Hayes' Popular View of Law of Real Property, 33—35.

Chap. IX.

"To acquire land, with 'notice,' whether actual or constructive, of the right of another, is, in the eye of equity, to acquire it dishonestly. A., in the case above supposed, is guilty of a breach of trust, to which C. is accessory. If C., having thus bought with knowledge of the trust, resell and convey the land to D. without communicating that knowledge, D. cannot be compelled to restore the land, but B. has his remedy in equity against both A. and C. to compel them to make good the loss which he has sustained" (*t*).

Now by the Conveyancing Act, 1882 (*u*), it has been endeavoured to express with certainty the law of constructive notice, which has hitherto had to be extracted from the numerous decided cases.

Trustee Act, 1850, and Extension Act, 1852.

The ordinary jurisdiction of a Court of Equity in the main suffices to call trustees to account, to compel their execution of the trusts, and to control their administration of them (*x*). But in cases in which a mere legal ownership remains in the trustee, and the trust itself has been satisfied, after a succession of statutes, the Trustee Act, 1850, and the Trustee Act Extension Act, 1852 (*y*), have provided a machinery for the divesting out of the trustee, and the transfer to the parties beneficially interested, or to new trustees, of the legal ownership of the estate itself.

The Acts provided for the conveyance of the estates of lunatic trustees (and mortgagees) by an order to be made by the Lord Chancellor, or other the person or persons entrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, that the lands be vested in such person or persons in such manner and for such estate as he or they should direct (*z*); that the Court of Chancery in like manner, by a vesting order, might convey the estates of infant trustees (and mortgagees) (*a*), the estate of a trustee, when he is out of the jurisdiction of the Court (*b*), or when it is uncertain which of several trustees was the survivor (*c*), or when it is uncertain whether the last trustee be living or dead (*d*), or when a trustee dies intestate without an

(*t*) Reference may usefully be made to the case of *Carter* v. *Williams* (L. R. 9 Eq. 678), as exemplifying the doctrine of constructive notice (though applied to another matter, viz., the burden of a restrictive covenant), showing on the one hand a state of facts in which it would arise, and on the other a state of facts in which it would not arise. See also *Patman* v. *Harland*, L. R. 17 Ch. D. 353.

(*u*) 45 & 46 Vict. c. 39, s. 3, App. *post*.

(*x*) Such matters are now assigned to the Chancery Division of the High Court: 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34, § 3.

(*y*) 13 & 14 Vict. c. 60, extended by 15 & 16 Vict. c. 55. *Ante*, p. 113.

(*z*) 13 & 14 Vict. c. 60, ss. 3, 4; 15 & 16 Vict. c. 55, s. 11; and 38 & 39 Vict. c. 77 (Jud. Act, 1875), s. 7.

(*a*) 13 & 14 Vict. c. 60, ss. 7, 8. Now Chancery Division of High Court, 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34 (3).

(*b*) Ss. 9—12. (*c*) S. 13. (*d*) S. 14.

heir, or it is not known who is the heir or devisee (*e*), or when a trustee refuses or neglects to convey (*f*), or when a trustee is convicted of felony (*g*). Or the Lord Chancellor, or other person entrusted with the care of lunatics, or the Court of Chancery, as the case might be, instead of making a vesting order, might make an order appointing a person to convey (*h*). Also it was enacted that whenever it should be expedient to appoint a new trustee, and it should be found inexpedient, difficult, or impracticable so to do without the assistance of the Court, the Court of Chancery might make an order upon petition appointing a new trustee, who should have the same powers as if appointed by decree in a suit; and at the same time, or by a subsequent order, to direct that any land subject to the trust should vest in such new trustee (*i*). And now, by the County Courts Act, 1865 (*k*), similar jurisdiction is conferred on the County Courts in all proceedings in which the estate shall not exceed in value the sum of £500.

Trustees, &c., Powers Act, 1860.

Conveyancing Acts, 1881, 1882.

It became the custom to insert in settlements, wills, and other instruments creating trusts, certain powers and provisions (among other things) for the appointment of new trustees, and the transfer of the trust estate to them, whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die, or desire to be discharged from, or refuse or become unfit or incapable to act. It was by the Trustees, &c., Powers Act, 1860 (*l*), provided that such powers should be incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in any deed, will, codicil, or other instrument executed after the passing of the Act (*m*), or under a will or codicil confirmed or revived by a codicil executed after that date (*n*). The Act, however, did not expressly authorise, in the execution of the powers conferred by it, the increase or reduction of the number of trustees; nor was provision made for the case of a trustee remaining out of the United Kingdom for more than twelve months; nor did it apply to the case of a retirement of a

(*e*) Ss. 15 and 16.

(*f*) Ss. 17, 18; and 15 & 16 Vict. c. 55, s. 2.

(*g*) 15 & 16 Vict. c. 55, s. 8.

(*h*) 13 & 14 Vict. c. 60, s. 20; and 15 & 16 Vict. c. 55, s. 11.

(*i*) 13 & 14 Vict. c. 60, ss. 32, 33 and 34; and 15 & 16 Vict. c. 55, s. 9. *Ante*, p. 270 (*x*). And see *In re Lemann's Trusts*, L. R. 22 Ch. D. 633.

(*k*) 28 & 29 Vict. c. 99, s. 1, § 5.

(*l*) 23 & 24 Vict. c. 145, ss. 27, 28.

(*m*) *i.e.*, 28th August, 1860.

(*n*) S. 34.

Chap. IX.

trustee without any new trustee being appointed; nor for the exercise of a legal power (*o*) by a new trustee appointed by the Court under its ordinary jurisdiction in equity, and not under the Trustee Acts. And in the case of trustees appointed under instruments prior to 28th August, 1860, where there was no power for appointment of new trustees, it was still necessary to apply to the Court. The provisions, therefore, of the above Act were repealed by the Conveyancing and Law of Property Act, 1881 (*p*), and corresponding powers with the addition of those previously omitted were given by that Act (*q*), and they were made to apply also to instruments executed at any time before the commencement of the Act. Further, the Conveyancing Act, 1882 (*r*), provides, as regards trusts created at any time that on an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on distinct trusts. Also the Conveyancing and Law of Property Act, 1881 (*s*), provides for the vesting of the trust property by a mere declaration by the appointor, that the trust property shall vest in the trustees under the deed appointed to perform the trust, except in certain specified cases, as in the case of land which has been conveyed to the trustees by way of mortgage for securing money subject to the trusts. Provision was also made by the Trustees, &c., Powers Act, 1860 (*t*), that trustees having power to sell might sell together or in lots, by auction or private contract, under special conditions, might buy in, &c.; the part of the Act containing such provision has been repealed by the Settled Land Act, 1882 (*tt*). By the Conveyancing and Law of Property Act, 1881 (*u*), similar powers were conferred on trustees in whom a trust for sale, or a power of sale, is vested by an instrument coming into operation after the 31st December, 1881, so far as a contrary intention is not expressed in the instrument, with the additional power of selling, or concurring in a sale of, all or any part of the property either subject to prior charges or not. The earlier statute also provided for trustees' receipts being discharges (*x*); this too has been repealed by the Conveyancing and

(*o*) *e.g.*, of sale.
(*p*) 44 & 45 Vict. c. 41, s. 71.
(*q*) Ss. 31—33.
(*r*) 45 & 46 Vict. c. 39, s. 5.
(*s*) 44 & 45 Vict. c. 41, s. 34.
(*t*) 23 & 24 Vict. c. 145, ss. 1 and 2.
(*tt*) 45 & 46 Vict. c. 38, s. 64.
(*u*) 44 & 45 Vict. c. 41, s. 35.
(*x*) 23 & 24 Vict. c. 145, s. 29.

Law of Property Act, 1881, and a more comprehensive enactment substituted for it (*y*).

Trustee Relief Act, 1859.

Application may be made under the Trustee Relief Act, 1859 (*z*), to the judges of the Chancery Division of the High Court by petition for their opinion, advice, or direction, on any question respecting the management or administration of the trust property; but this does not apply to questions of construction, which can only be decided in a regular suit (*a*). Where the trust estate (or fund) does not exceed in (amount or) value £500, the judge of the County Court within the district of which the persons making the application, or any of them, reside or resides, has concurrent jurisdiction, under the County Courts Act, 1865 (*b*).

Forfeiture. Escheat. Advantage to trustee.

It remains to add that a trust estate was made exempt from forfeiture by reason of the attainder or conviction of the trustee, by the Trustee Act, 1850 (*c*); and, on the other hand, a trust of inheritance does not escheat for want of inheritable blood, but the trustee will in such case hold the land discharged of the trust (*d*): Lord Hale compared this to the case of the grantee of a rent-charge in fee dying without heirs, when the tenant of the land should hold it discharged of the rent (*e*). In the above case only may a trustee derive advantage from the trust.

(*y*) 44 & 45 Vict. c. 41, ss. 36 and 71. The earlier Act applied only to receipts for money; the new Act extends also to securities or other personal property or effects.

(*z*) 22 & 23 Vict. c. 35, s. 30; 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34, § 3.

(*a*) *Re Hooper*, 29 Bea. 656; and Dan. Ch. Pr. 1943; as to the signature by counsel, see 23 & 24 Vict. c. 38, s. 9, and *In re Boulton's Trusts*, W. N. (1882), p. 62.

(*b*) 28 & 29 Vict. c. 99, s. 1 § 5 and s. 10.

(*c*) 13 & 14 Vict. c. 60, ss. 46 and 47.

(*d*) Lewin on Trusts (7th ed.), 253; Godefroi on Trusts, 243. *Ante*, pp. 23 and 249.

(*e*) *Att-Gen.* v. *Sands*, Hard. 496, quoted in Lewin on Trusts (2nd ed.), 260.

Chap. X.

CHAPTER X.

CONVEYANCES.

OCCASIONAL reference has been made in former chapters to some of the different assurances or modes of Conveyance which have, from time to time, been resorted to for effecting the alienation of land, or creating interests in it. It will be proper, however, to treat of these modes of conveyance generally in more detail.

I. Feoffment.

With the exception, perhaps, of fines (*a*), the earliest mode of conveyance resorted to, in respect to either the original feudal investiture or the subsequent transfer of land, was the Feoffment. It was applicable only to the conveyance of the freehold of land —*i.e.*, corporeal hereditaments, in possession (*b*).

The word 'feoffment' was derived from the verb 'to enfeoff' (*feoffare* or *infeudare*, to give one a feud), and was the substantive act of donation, which was completed by investiture or 'livery of seisin'—that is, delivery of the corporeal possession of the land (*c*). In process of time, when writing came more into use, a record of the gift or alienation was made in writing, called the Charter of Feoffment. The ancient form of public delivery, however, was still retained; and the feoffment, to be complete, had to be accompanied with delivery, or, as it was called 'livery of seisin,' the fact of which came at length to be endorsed on the deed (*d*). In the earlier days, the publicity of the transaction was of its very essence (*dd*), and where the written document or charter was resorted to, it became the custom to affix a seal to it by way of giving it greater solemnity; and such writing, sealed and delivered, was called a deed (*factum*). When signature was introduced, parties unable to sign their own names were accus-

(*a*) 2 Bl. 349, which see for account of fines; and *ante*, pp. 69 *et seq.*

(*b*) 2 Bl. 310.

(*c*) *Ante*, p. 20; and 2 Bl. 310 *et seq.*

(*d*) *Ib.*

(*dd*) Compare the account in Gen. xxiii., 16—18, of the purchase by Abraham of the field of Ephron—which is said to be the first legal contract recorded in human history (Stanley's Jewish Church, 536).

tomed to affix a mark, which was ordinarily a cross, the symbol of the religion of the country; and hence the origin of the practice which has existed even down to the present time, in the case of illiterate persons, of their putting their mark or cross to documents.

Operative words.

The feoffment, when a written document, was in form an authentication of a previous transaction, and by it the feoffor declared that he had "granted and enfeoffed,"—referring thereby to the previous act,—and went on to add, "and that he did thereby grant, enfeoff, and confirm" (*e*).

Writing.

Neither writing nor signature was essential until the reign of Charles II., A.D. 1677, when it was made so, for the creation or transfer of all estates and interests of freehold, by the Statute of Frauds (*ee*), which required a writing signed by the party creating or transferring the same, or by his agent by writing lawfully authorised, except for the creation of an estate at will. It was enacted:—

> S. 1. "That from henceforth all leases, estates, interests of freeholds or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates to the contrary notwithstanding."
>
> S. 3. "That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing or by act and operation of law."

(*e*) See form, 2 Crabb, 978.

(*ee*) 29 Car. II. c. 3, ss. 1, 3. By the 4th section it was enacted that no action should be brought "upon any contract or sale of lands, &c., or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Notwithstanding this, specific performance will be decreed in equity in favor of the party who has in part performed the agreement, that is, done acts in part performance unequivocally referable to the agreement. See *Alderson* v. *Maddison*, L. R. 7 Q. B. D. 174; and *Humphreys* v. *Green*, L. R. 10 Q. B. D. 148.

Chap. X.

Deed.

And now by the Act to Amend the Law of Real Property (*f*), a feoffment made after 1st of October, 1845, except one made under the custom of gavelkind by an infant, must be evidenced by deed. Until that statute made corporeal hereditaments to 'lie in grant' as well as 'in livery,' the feoffment was used as a conveyance by a corporation (*g*); for it was said, a corporation could not stand seised to a use (*h*), and therefore the Lease and Release (*hh*), which became the common form of assurance between individuals, taking effect under the Statute of Uses, could not be resorted to by a corporation. As we have seen (*i*), after the Statute of Uses, it became necessary to a feoffment that there should be a consideration for the gift, or that it should be 'unto and to the use of' the feoffee; otherwise the use would result to the feoffor. Although, at the present day, land may be conveyed by feoffment, this is never done, except in the case of a conveyance by an infant under the custom of gavelkind (*k*); but it formed the model on which later deeds of conveyance have been constructed (*l*). Although the feoffment by an infant need not be evidenced by deed, it must be by writing, signed by the infant; who, at the time of the feoffment, must be in actual possession of the land (*m*).

Livery.

Livery was of two kinds—livery 'in deed,' and livery 'in law.' They are thus described by Blackstone (*n*):—

"Livery in Deed is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: 'I deliver these to you in the name of seisin of all the lands and tenements contained in this deed.' But, if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any

(*f*) 8 & 9 Vict. c. 106, s. 3.
(*g*) 2 Da. i. 177.
(*h*) *Ante*, p. 268.
(*hh*) *Post*, p. 283.
(*i*) *Ante*, p. 255.
(*k*) 2 Da. i. 177.
(*l*) See form, *ib.* 244; and of charter of feoffment, 2 Bl. Appendix.
(*m*) 2 Da. i. 245, note.
(*n*) Vol. ii. 315.

parcel, in the name of the rest, sufficeth for all; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law, *pares debent interesse investituræ feudi, et non alii:* for which this reason is expressly given; because the peers or vasals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed (like that of all other attestations) was still reserved to the *pares* or jury of the county. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case, but by the consent of the particular tenant; and the consent of one will not bind the rest. And in all these cases it is prudent, and usual to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses. And thus much for livery in deed.

"Livery in Law is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, 'I give you yonder land, enter and take possession.' Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves."

Tortious operation.

It was this public avowal of an ownership that, in the instance in which the party was purporting to deal with an estate greater than he actually possessed,—a tenant for life, for example, or tenant for years conveying for an estate in fee—gave to the feoffment the effect, already adverted to (*nn*), of a tortious operation; or, in other words, one by disseisin. It amounted to an open assertion of a right inconsistent with the existence of the same right in any other—a practical turning out or disseisin of all others from the possession; and it therefore necessitated a reentry on the part of the rightful owner, in order to revest in himself the estate of which he had been thus disseised (*o*). As we have seen, it has in the present reign (*p*), been enacted that a

(*nn*) *Ante*, p. 45.

(*o*) 2 Bl. 275; Litt. s. 416, ed. by Thomas, vol. iii. 65.

(*p*) 8 & 9 Vict. c. 106, s. 4.

Chap. X.

feoffment made after 1st October, 1845, shall not have any tortious operation.

Limitation.

By the feoffment was marked out the interest which the feoffee was to take under it, whether for life, in tail, or fee; and this was called 'limiting' the estate. In modern times, whether in reference to a feoffment or any other description of assurance, this limiting of the estate was and is still necessary.

In deeds executed after 1881, it is sufficient in the limitation of an estate in fee simple to use the words 'in fee simple,' without the word 'heirs,' and of an estate in tail, the words 'in tail,' without the words 'heirs of the body' (*q*).

II. Grant.

From the very nature of the thing, a feoffment was applicable only to the case in which freehold land in possession was the subject. But where the subject-matter did not admit of manual possession at all, as, for example, an incorporeal hereditament; or not of immediate possession, as, for example, an interest in remainder or reversion, it was not a fitting subject for an assurance of this nature. Interests of this kind were, from an early time, passed by what is termed a 'grant,' that is, a gift unaccompanied by livery of seisin; and hereditaments of a corporeal nature, and of which the right to possession is immediate, were said to 'lie in livery,' while those in expectancy, or incorporeal hereditaments, were said to 'lie in grant.'

But, as we have seen, although a remainder must arise by grant, a reversion, if on a lease for years, might have been and may still be (though it never is) conveyed by feoffment with livery of seisin, for the owner in fee simple has not parted with the feudal seisin, but only placed as it were a bailiff on his property (*r*).

By deed.

A Grant could not be made without deed; because as the possession of those things, which were the subject-matter of a grant, could not be transferred by livery, there could be no other evidence of the grant but the deed.

Attornment.

Until dispensed with by 4 Anne, c. 16, in every case of a grant of an estate in expectancy, or feoffment in case of a reversion after a lease for years, the attornment of the tenant was necessary to complete its effect (*s*).

(*q*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51.

(*r*) *Ante*, pp. 203, 207.

(*s*) *Ante*, pp. 206, 213.

There being no livery of seisin, a grant could not operate by wrong, but only passed that which might be rightfully granted (*t*). Not operating by wrong.

The apt words for all kinds of grants were '*dedi et concessi*,' 'I have given and granted;' but other words would suffice if they imported an intention to grant (*tt*). Operative words.

By the Conveyancing and Law of Property Act, 1881 (*u*), it is declared that the use of the word 'grant' is not necessary to convey tenements or hereditaments, corporeal or incorporeal.

Since the Act to Amend the Law of Real Property (*x*) has enacted, that from the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, a simple deed of grant will pass, and is the ordinary mode of conveying, the freehold or feudal seisin of all lands (*y*). Now ordinary conveyance.

Formerly, the word 'give' in a feoffment implied a personal warranty on the part of the donor of his title to the lands; and the word 'grant' was, unless restrained by express covenant, supposed also to imply a warranty (*z*). But the Act to Amend the Law of Real Property (*a*), while abolishing the tortious operation of a feoffment executed after the 1st October, 1845, enacted, that the word 'give' or the word 'grant' in a deed executed after the same day, shall not imply any covenant at law in respect of any tenements or hereditaments, except so far as they may by force of any Act of Parliament imply a covenant. For instance, by the Lands Clauses Consolidation Act, 1845 (*b*), it is enacted that in every conveyance of lands to be made by the promoters of the undertaking under that or the special Act, the word 'grant' shall operate as the ordinary express covenants for title; also under some local Building Acts, such covenants are in certain cases implied. Implied warranty.

In the place of a warranty it has been the custom in modern times to express in the conveyance what are called 'covenants for title'—namely, that the grantor has power to grant, that the grantee shall have quiet enjoyment, free from incumbrances, and that the grantor will do what may be requisite for Title.

(*t*) Co. Litt. 332*a*, ed. by Thomas, vol. iii. 133.

(*tt*) Shep. Touchstone, 232.

(*u*) 44 & 45 Vict. c. 41, s. 49.

(*x*) 8 & 9 Vict. c. 106, s. 2.

(*y*) *Ante*, p. 86. See form, 2 Da. i.

(*z*) Co. Litt. 384*a*, ed. by Thomas, vol. ii. 252; and 4 Cru. Dig. 52.

(*a*) 8 & 9 Vict. c. 106, s. 4.

(*b*) 8 & 9 Vict. c. 18, s. 132.

Chap. X. further assuring the premises to the grantee. Mr. Davidson says (*c*) :—

"In every conveyance on a sale of freeholds, not made solely by persons in a fiduciary character, as trustees or mortgagees, the purchaser is entitled to the following covenants: 1st, that notwithstanding anything done by the seller or his ancestors or testators, the parties conveying have power to convey the property to the purchaser for the estate expressed to be limited; 2nd, for quiet enjoyment, without disturbance by the seller or anyone claiming through him, or through his ancestors or testators; 3rd, for freedom from incumbrances created by the seller, or his ancestors or testators; and, 4th, for further assurance by the seller, and all persons claiming through him, his ancestors, or testators. It was formerly usual to preface these covenants by a covenant, that notwithstanding anything done by the vendor, his ancestors or testators, the conveying parties were seised in fee; or, where the conveyance was by appointment, that the power was well created and is in force; but such a covenant being obviously implied in the covenant for right to convey, its use has been generally abandoned" (*d*).

Trustees, mortgagees, and other fiduciary vendors, generally covenant only that they have done no act to incumber the property or to prevent their granting it (*e*).

It is now provided by the Conveyancing and Law of Property Act, 1881 (*f*), for the purpose of shortening conveyances, that in a conveyance for valuable consideration other than a mortgage, there shall be implied by the person who conveys and is expressed to convey as beneficial owner, the covenants for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance; and in any conveyance by any person who conveys and is expressed to convey as trustee, or mortgagee, or in other fiduciary character as therein mentioned, a covenant against incumbrances shall be implied (*g*).

The purchaser or mortgagee does not, however, ordinarily rely merely upon the covenants for title; but, before execution of the conveyance, examines the title for himself, which in the absence of agreement to the contrary, must, under the Vendor and Purchaser Act, 1874 (*h*), commence with a document at least forty years old.

III. Lease. We will next consider a Lease or Demise. "*Lessa* and lease,"

(*c*) Vol. ii. pt. i. p. 191.
(*d*) See forms, *ib.* pp. 232 and 237, &c.
(*e*) *Ib.* 275 and 293; also see 261.
(*f*) 44 & 45 Vict. c. 41, s. 7.
(*g*) S. 7 (1), (A. and F.); and see *ante*, pp. 152 *et seq.*, and 196.
(*h*) 37 & 38 Vict. c. 78, s. 1; and see Dart's V. & P. vol. i. pp. 293 *et seq.*

says Lord Coke (*i*), "is derived of the Saxon word *leapum* or *leasum*, for that the lessee cometh in by lawful means; and *dimittere* is in French *laysser*, to depart with or forego." A lease has been defined, as we have seen it to be (*k*), "a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or else" (and that is the light in which we are now to consider it) "it is a conveyance of lands and tenements to a person for life or years, or at will, in consideration of a return of rent or other recompense" (*l*). On a lease for life of lands or tenements in possession, as it went to the seisin as well as the possession, being a freehold interest, livery was necessary to be made as on a feoffment (*m*), prior to the Act to Amend the Law of Real Property (*n*), which made the immediate freehold to lie in grant as well as in livery (*o*). In other cases prior to the Statute of Uses, entry by the lessee was absolutely necessary to complete the lease; but it is not so now if the lease be by a conveyance operating by virtue of the statute, *e.g.*, a bargain and sale to be spoken of presently; for thereby the lessee will be adjudged to be in possession—that is, he will have the whole term vested in him at once in the same manner as if he had actually entered (*p*).

Livery.

Entry.

The Statute of Frauds (*pp*) first required leases to be in writing and signed by the lessor, or his agent lawfully authorised by writing, with an exception in favor of leases "not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the value of the thing demised." And now the Act to Amend the Law of Real Property enacts (*q*), that a lease required to be in writing shall be void at law unless made by deed.

In writing.

By deed.

The operative words of a lease, usually though not necessarily employed, were 'demise, grant, and to farm let'—'*demisi concessi et ad firmam tradidi.*' The word 'demise' only is now commonly used. The expression, 'to farm let' is thus explained by Blackstone (*r*):—

Operative words.

(*i*) Co. Litt. 43*b*, ed. by Thomas, vol. ii. p. 403.

(*k*) *Ante*, pp. 143, 144.

(*l*) Co. Litt., ed. by Thomas, vol. ii. 403, note.

(*m*) *Ib.* 404, note.

(*n*) 8 & 9 Vict. c. 106, s. 2.

(*o*) *Ante*, p. 276.

(*p*) Co. Litt. 270*a*, ed. by Thomas, vol. ii. p. 502. *Ante*, p. 144.

(*pp*) 29 Car. II. c. 3, ss. 1, 2; and see *ante*, pp. 141, 144, and 275.

(*q*) 8 & 9 Vict. c. 106, s. 3.

(*r*) Vol. ii. p. 318.

Chap. X.

"'Farm' or *feorme*, is an old Saxon word signifying provisions: and it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present by a gradual departure from the original sense, the word 'farm' is brought to signify the very estate or lands so held upon farm or rent."

Title.

We have spoken of the covenants by the lessee usually inserted in a lease (*s*). On the other hand, there will be implied an absolute covenant by the lessor for quiet enjoyment by the lessee, unless, as is usually done, a covenant is expressed in terms limiting it to interruption by the lessor or any person claiming through him (*t*).

It was provided by the Vendor and Purchaser Act, 1874 (*u*), that under a contract to grant a term of years, whether out of a freehold or leasehold estate, the intended lessee shall not be entitled to call for the title to the freehold.

IV. Release.

A Release has been defined to be:

"The conveyance of a man's interest or right which he hath to a thing to another who hath possession thereof, or some estate therein" (*x*).

It presupposes some other conveyance precedent (*y*). In such a case, a feoffment would have been inapplicable, for possession would not be in the releasor (*z*); therefore there could be no livery. Thus, suppose A. to be tenant for life or for years of any given estate, the reversionary interest in which was vested in B.; were B. to desire to give up or surrender to A. all his (B.'s) interest, this would be effected by a release which would operate as a conveyance to A. of the fee; A., instead of remaining tenant only for either life or years as the case might be, would thenceforth become seised in fee of the whole estate. The smaller interest would, under the effect of the release, become merged or extinguished in the larger. So, suppose A. and B. to be joint

(*s*) *Ante*, pp. 148 *et seq.*

(*t*) 2 Prid. 39. See *Dennett* v. *Atherton*, L. R. 6 Q. B. 316; and *Porter* v. *Drew*, L. R. 5 C. P. D. 143.

(*u*) 37 & 38 Vict. c. 78, s. 2. This does not affect the rule that a lessee has constructive notice of his lessor's title: *Patman* v. *Harland*, L. R. 17 Ch. D. 353. And see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 4.

(*x*) Bacon's Abridgment, tit. Release.

(*y*) Bl. vol. ii. 324.

(*z*) Co. Litt., ed. by Thomas, vol. ii. 451, note.

tenants of an estate, under which, as it will be remembered, each is seised not of a particular and ascertained share, but of the whole itself; and suppose a desire in A. to withdraw from all participation in the ownership in favor of B., and to make him sole owner of the whole; the appropriate assurance by which to effect this would be a release, whereby A. would release to B. all his (A.'s) estate in the joint tenancy. On the other hand, one tenant in common cannot release to his companion, because they have distinct freeholds (*a*). The operative words of such an instrument would be those importing a release; and now the word 'release' alone is commonly used. But Littleton gives the following precedent: "Know all men by these presents, that I, &c., have remised, released, and altogether from me and my heirs quiet claimed to C., &c., all the right, &c.;" or, expressed in Latin, "*remisisse, relaxâsse, et quietum clamâsse,*"—the first and last expressions, he adds, are of the same effect as the second (*b*). "Such release, must of necessity," says Lord Coke (*c*), "be by deed."

Operative words.

By deed.

As society advanced and wealth increased, the strictness of the feudal system more and more gave way, and when land became the subject of frequent dealing and transfer, the inconveniences of a personal resort to the spot, on a change of ownership, to accomplish the open delivery of possession involved in the livery of seisin, gave rise to devices to dispense with it. One was early found in the adoption of the compound principle of the two assurances of the Lease and the Release. A Lease was made to the party to whom the transfer was to be made; and then, he having entered into possession under his lease and thereby acquired legal ownership, a Release was executed to him of the fee by a contemporaneous deed; and he thus acquired an estate as effectually as if a feoffment of it had been made to him.

V. Lease and release.

A much more extended application of the principle was subsequently had under the operation of the Statute of Uses by means of a Bargain and Sale, which, says Blackstone (*d*)—

Bargain and sale.

"Is a kind of real contract, whereby the bargainor for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee; and becomes by such bargain a trustee for, or seised to

Statute of Uses.

(*a*) Bacon's Abridgment, tit. Release. *Ante*, p. 234.

(*b*) Co. Litt. s. 445, ed. by Thomas, vol. ii. 452.

(*c*) Co. Litt. 265*a*, ed. by Thomas, vol. ii. 453. As a grant must be, *ante*, p. 278.

(*d*) Vol. ii. 338.

Chap. X.

Statute of Enrolments.

the use of, the bargainee; and then the Statute of Uses completes the purchase: or, as it has been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of Parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the Courts of Westminster-Hall, or with the *custos rotulorum* of the county."

The publicity which the enrolment gave, interfered with the secrecy in which it was often desired to wrap conveyances, and the ingenuity of the lawyers soon found a remedy in the hint furnished by the old common law conveyance of Lease and Release.

A Bargain and Sale for a term of years did not require enrolment, for the Act spoke only of estates of inheritance or freehold; while, as we have seen, it created an actual legal interest or estate in the bargainee on which a release could operate. The device, therefore, resorted to in order to get rid of the inconveniences of the Statute of Enrolments, was simply to make a bargain and sale (*f*) for a nominal term, say a year, at a nominal pecuniary consideration, say 10*s*. or 5*s*., under which the bargainee stood in the position of the lessee under the common law lease after entry, with an estate by reason of his possession capable of enlargement by the operation of a release; which was given by a contemporaneous deed, generally dated the following day (*g*). Thus, supposing A. desirous to grant an estate in fee simple to B., all he had to do was by one deed to grant him, for a pecuniary consideration (*h*), a lease for a year of the land, and, by another of the date of the following day, to release to him the estate to hold in fee; and B. would thus have become placed in the legal seisin in fee of the property. Did he desire to constitute a third party, say C., the beneficiary, it was only necessary to go on to add that B. was to hold in trust for or to the use of C.

Before 4 & 5 Vict. c. 21, two deeds.

Originally there were two distinct deeds, the Lease and the Release, though, in the latter, it was customary to recite the former, and state the property to be in the actual possession of the releasee by the double operation of the Lease and the Statute

(*f*) Which after the Statute of Frauds had to be in writing, as no rent was reserved, and usually was by deed (Wms. 185).

(*g*) 2 Bl. 339.

(*h*) Which might be nominal (2 Sanders on Uses, 57). Hence arose the above practice of inserting in all conveyances a nominal consideration to each of the conveying parties to whom no consideration money was paid. (2 Da. i. 303 (c))

for transferring uses into possession (*i*). In process of time, however, it was felt that the lease was a mere matter of form, and so far an inconvenient incumbrance, and it was ultimately dispensed with under an Act of the present reign, intituled, An Act for rendering a Release as effectual for a Conveyance of Freehold Estates, as a Lease and Release between the same parties. The Act declared that every instrument purporting to be a Release, and expressed to be made in pursuance of the Act, should be as effectual as if a bargain and sale, or lease for a year, had been executed, although not executed in fact (*ii*).

Superseded: 8 & 9 Vict. c. 106.

A still wider sweep was made by the later Act for the Amendment of the Law of Real Property (*k*), taking away the very occasion for the lease for a year by abolishing the distinction as to the mode of conveyance between estates lying in livery and those lying in grant—in other words, between estates in possession and estates in remainder or reversion; and enacting that henceforth all corporeal hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. The result of this statute has been the disuse, not only of the double machinery of the lease and release, but of the form of deed of release itself, and practically all deeds of conveyance have thus become deeds of Grant. But a bargain and sale of freeholds will still operate under the Statute of Uses if enrolled within six months after its date (*l*). It has, since the above Act, been usual to use the word 'grant' as the operative word in a conveyance of freeholds, but to remove any idea that such word was necessary, it has, as already stated, been declared by the Conveyancing and Law of Property Act, 1881 (*m*), that the use of the word 'grant' is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal, whether the conveyance be before or after the Act.

VI. Conveyances, besides grant, which may still be used.

In addition to the Grant, the common form of conveyance of freeholds at the present day, recourse may still be had, then, (1) to the Feoffment with livery of seisin, but except in the case of conveyance by infants under the custom of gavelkind never is, though before the passing of the Act to Amend the Law of Real Property (*n*), which enacted that corporeal as well as incorporeal

(*i*) See form in 2 Blackstone, Appendix.
(*ii*) 4 & 5 Vict. c. 21.
(*k*) 8 & 9 Vict. c. 106, s. 2.
(*l*) 2 Da. i. 179.
(*m*) 44 & 45 Vict. c. 41, s. 49. *Ante*, p. 279.
(*n*) 8 & 9 Vict. c. 106, s. 2.

Chap. X.

hereditaments should be deemed to lie in grant as well as in livery, the feoffment was used as a conveyance by a corporation, for it was said a corporation could not stand seised to the use of another, and therefore could not make a bargain and sale (*o*); (2) to the Bargain and Sale when founded on a money consideration operating under the Statute of Uses, followed by enrolment within six months, (now never resorted to);—also there is another Bargain and Sale not operating under the statute, to be spoken of in the next Chapter;—and (3), where the consideration is natural love and affection to a child or near relation, or marriage, to a Covenant to stand seised,—the seisin remains in the covenantor, he standing seised to the use of the covenantee (*p*). In the bargain and sale operating under the statute, and the covenant to stand seised, the conveyances only pass a use, the legal estate and possession are transferred by the statute (*q*); so they cannot be made to one person to the use of another, for that would be to declare a use upon a use. And there is the conveyance by way of Appointment of the use under a power, also to be spoken of in the next Chapter.

VII. Conveyance of leaseholds.

In writing.

The instrument of conveyance of leaseholds or terms of years, which, by the Statute of Frauds (*r*), was required to be in writing, has been hitherto called an Assignment; but in the Conveyancing and Law of Property Act, 1881 (*s*), the word 'conveyance' includes 'assignment,' unless a contrary intention appears, and 'convey' has a meaning corresponding with that of 'conveyance,' so that in future probably the words 'conveyance' and 'convey' will be used in regard to assurances generally, whether of freehold or leasehold. By the Act to Amend the Law of Real Property (*t*), an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, made after 1st October, 1845, will be void at law unless made by deed.

By deed.

Title.

As in a conveyance of freeholds, so in an assignment of leaseholds, it has been customary to express in the deed covenants for title by the assignor—namely, that the lease is good, that the rents and covenants have been paid and observed, for right to assign, for quiet enjoyment, free from incumbrances, and for

(*o*) Watkins, 232, 421; and 2 Da. i. 177. *Ante*, p. 276.

(*p*) 2 Da. pt. i. 175, 179; and Wharton's Law Lexicon.

(*q*) 2 Da. i. 180.

(*r*) 29 Car. II. c. 3, s. 3. *Ante*, p. 275.

(*s*) 44 & 45 Vict. c. 41, s. 2 (v.).

(*t*) 8 & 9 Vict. c. 106, s. 3. *Ante*, p. 137.

further assurance. On the other hand, the assignee covenants to pay rent and perform the covenants, and to indemnify the assignor in respect thereof (*u*). We have seen (*x*) how far the covenants by the assignor may now be implied under the Conveyancing and Law of Property Act, 1881 (*y*).

With regard to the commencement of title it has been provided by the Vendor and Purchaser Act, 1874 (*z*), that under a contract to (grant or) assign a term of years, out of freehold or leasehold estate, the intended (lessee or) assign shall not be entitled to call for the title to the freehold. And it has been further provided by the Conveyancing Act, 1882 (*a*), that where a lease is made under a power any preliminary contract shall not for the purpose of the deduction of the title to an intended assign form part of the title; this applies to leases made before or after January 1st, 1883.

VIII. Conveyances at common law—under the statute.

It may be well, in conclusion, as the student is now in a position to understand it, to refer to Mr. Butler's note to Fearne's Contingent Remainders, as to the difference between conveyances at common law and conveyances which derive their effect from the Statute of Uses. It will be observed that it was written with reference to the then state of things, that is, before the grant had taken the place of other assurances, and also before the abolition of fines and recoveries. He says:—

"A feoffment, fine, and recovery, are conveyances at the common law, so far as they convey the land to the feoffee, conusee, or recoveror; if they are directed to operate to, or to the use of the feoffee, conusee, or recoveror, they have no other operation than as conveyances at the common law: but if they are directed to operate to the use of any other person, then, though they are conveyances at common law so far as they convey the land to the feoffee, conusee, or recoveror, they derive their effect under the Statute of Uses, so far as the use is limited by them to the person or persons in whose favour it is declared. A lease and release has a mixed operation; the lease has the operation of a bargain and sale, and is in effect a bargain and sale under the statute; but the fee passes to the lessee, and enlarges his estate to an estate of inheritance by the operation of the release at the common law; and, if the release is directed to operate to, or to the use of the releasee, he is said to be in by the common law; but if the use be declared in favour of another person, the statute then again intervenes, and executes the use in the person or persons in whose favour it is declared. A bargain and sale enrolled, and

(*u*) See form, 2 Da. i. 419.
(*x*) *Ante*, p. 152.
(*y*) 44 & 45 Vict. c. 41, s. 7, (1) (B.) & (D.).
(*z*) 37 & 38 Vict. c. 78, s. 2, § 1.
(*a*) 45 & 46 Vict. c. 39, s. 4.

Chap. X.

a covenant to stand seised, wholly derive their effect from the Statute of Uses; the first is considered a real contract, by which the bargainor, for a pecuniary consideration, sells and contracts to convey the lands to the bargainee; the second is a real covenant, by which a person covenants to stand seised to the use of his or her husband, wife, child, or near relation. Neither of those conveyances has any effect at the common law, or independently of the Statute of Uses, in conveying the land from the party selling or covenanting to stand seised to those in whose favour they are intended to operate; so that at common law they have no legal operation, and are merely declarations of trust binding the land in equity. But the statute attaches on them, and devests the land from the party selling or covenanting to stand seised, and vests it in the person to whom it is limited" (*b*).

(*b*) Butl. Fearne, 416, 10th ed.

CHAPTER XI.

POWERS.

We have now considered the general nature of an estate—the distinction between estates legal and equitable—and the operation in relation thereto of the Statute of Uses. In order to a more complete apprehension of the law relating to real property and the interests in it, it will be proper to consider the nature of that particular species of ownership, or right of giving to ownership a direction, which exists in what is technically termed a 'Power.'

I. Distinction between a power and an estate.

An estate in property is, as we have seen, its actual ownership, and that either exhaustive of the whole interest (subject to that of the lord paramount), as in the case of ownership in fee simple, or for some limited interest, as in the case of an estate for life or in tail; and this ownership, if accompanied with the legal seisin, carries with it the right to the actual possession; if an equitable one, it carries with it the right to compel the legal holder to account for the profits. This seisin, or right, as the case may be, is called an Estate, and either legal or equitable, according to the circumstances. A Power is distinguishable from both. It is a bare authority.

If A. devise to B. lands in fee simple to hold to the use of B. and his heirs, or to hold to the use of B. and his heirs in trust for some one else and his heirs; in either case an estate is created—in the first instance a legal one in the devisee, in the second instance an equitable one in him for whose benefit the estate is to be held, *i.e.*, the *cestui que trust* (*bb*). But if, instead of devising the property itself, A. by his will direct B. to sell it for the payment of debts, B. takes a power, that is, an authority to sell, but not any estate in the property. Again, suppose lands conveyed by deed to A. and his heirs to hold to the use of B. and his heirs; B., under the Statute of Uses, acquires an estate in fee simple in the property. But suppose, instead of conveying it to

(*bb*) As to the old controversy whether a devise to uses operates by virtue of the Statutes of Wills alone, or by force of those Statutes concurrently with the Statute of Uses, see 2 Jarman, chap. xxxiv.

Chap. XI.

A. and his heirs to hold to the use of B. and his heirs, A. were directed to stand seised to such uses as B. should by deed or will appoint, and if he failed to appoint, and in the meanwhile subject to his appointment, then to the use of C. and his heirs; B. would have no estate at all, but only a power,—a power of appointing the use; and in the meanwhile, until his exercise of this power, the estate would have devolved upon C., subject only to his being divested of it, as it is termed, that is, its being taken out of him, should B. ever exercise his power. This, however, B. might do; and he might do it so as to exhaust the ownership; for example, he might appoint the whole fee simple to D., or he might exercise the power partially only, for instance, in favor of D. for his life only, confining the exercise of his power to this. In the former case, the exercise of the power would be a total divestment of C. of his estate, and the transfer of it to D.; in the latter, C. would be divested only to the extent of the interposition of D.'s life estate. In the first case, the result of the exercise of the power would be the same as if by the instrument creating it A. had stood seised to the use of D. in fee; in the second, it would be as if he had stood seised to the use of D. for his life, with remainder to the use of C. in fee.

Power over the use.

The power, it will be observed, is over the use only. The appointment would be a declaration of a new use upon the seisin of the grantee, releasee, or feoffee of the original deed by which the power was created; and the new use would take effect, from the time of execution of the power, as if it had been created by the original deed raising the power (*a*).

Power with or without an interest.

A power, though creating no estate in the person on whom it is conferred (called the donee of the power) may, and ordinarily does, create an interest in him; but this is by no means a necessary element in the constitution of a power. In the case last put, namely, of property being settled so as to be subjected to the appointment of another—that is, of property vested in the trustee A. to such uses as B. should appoint, and in default of appointment, to the use of C. and his heirs—B. having through the means of his power the whole dominion over the property, might not only disappoint the interest of C., but might appropriate the interest to himself. For instance, he might sell the property to

(*a*) 2 Da. i. 176.

a purchaser, and put the money in his own pocket; the effect of his appointment to the purchaser would be to vest the estate in such purchaser. Or he might appoint to himself, and confer on himself the estate; or he might dispose of it by his will. On the other hand, in the case first put, that of the authority to sell for payment of the debts of the testator, the person invested with the power would have an office but no interest. In the act of selling, he would be acting only in a fiduciary capacity, selling merely for the payment of the creditors, and would take no interest. So it often happens in family settlements of personalty (including real property settled as personalty), where subject to the life interest of a parent, the funds comprised in the settlement are intended after his death to be divided among the children, in proportions adjusted with reference to their respective wants; or in a strict settlement of realty where a sum is to be raised for the portions of younger children, the power of determining the division, or, in other words, of appointing the funds among the children, is entrusted to the parent. Or again, in a settlement of realty, where, following a life estate to the parent, remainders are limited to the children of the marriage as the parents or the survivor shall appoint (*b*). Here, the parent's own interest being limited to his own life, it is obvious that, as regards the corpus or capital of the funds, or the sum to be raised, or the lands themselves, he takes no ulterior estate or interest. All that he has is a mere power of selection among his children. It may be that he can, if he choose, give all to one child, or a larger proportion to one child, and a smaller to another. In any case, all that he is invested with is a power. So in a settlement of landed property as realty, powers may be reserved to those who stand in the situation merely of trustees, and have no ownership at all, to do acts connected with the administration of the property, as during the minority of the tenant in tail to manage the property, to grant leases, &c., or at the request of the tenant for life, or during the minority of the tenant in tail, at their own discretion to sell or exchange, &c. (*c*).

Whole estate and power in same person.

But there is nothing incongruous in both estate and power co-existing in the same individual. We have instanced the case of a party having a partial estate only, with a superadded power in regard to the division among his children. So, too, property

(*b*) 3 Da. ii. 1236; or Conc. Prec. 399. (*c*) See form, Da. Conc. Prec. 403.

Chap. XI.

may be limited to one for his life, and after his death as he shall appoint; but if he do not choose to exercise this power of appointment, the property is to go in some defined course—say, among the brothers of the settlor; or it may be limited to a parent for life, with remainder to his children as he shall appoint. In all these cases, the power may well subsist by way of addition to the partial ownership. But beyond this, suppose an estate limited to such uses as A. shall appoint, and in default of appointment to A. himself in fee simple; it will not at first sight, perhaps, appear for what reason the estate and the power should thus be accumulated in the same individual, or how the two could co-exist, yet in truth they might, "the fee vesting until execution of the power, and the execution of the power being the limitation of a use under and by the effect of the instrument, by which the power was reserved" (*d*). This doctrine had some practical result; for it was by so limiting a property on the conveyance of it, that in cases where the purchaser was married before the 1st January, 1834 (*e*), the widow's right to dower was prevented from attaching, and the inconvenience of its having attached was obviated.

Barring dower.

The form commonly used for effecting this consisted of two distinct parts, each of which answered a separate object. First, a general power of appointment over the fee simple was given to the purchaser by limiting the land to such uses as he should appoint; thus enabling him to dispose of the fee simple without his wife's concurrence, by an exercise of his power: and secondly, the land was in default of appointment limited to the use of the purchaser for his life, with remainder to a trustee and his heirs during the life of and in trust for the purchaser, with an ultimate limitation to the use of the purchaser in fee simple. Thus, the purchaser had not at any time during his life an estate of inheritance in possession, out of which estate only a wife married before the 1st January, 1834, was dowable; for, under the first part of the form the purchaser took no estate but only a power, and in the second part of the form a vested estate of freehold, namely, in the trustee, was interposed between the life estate and the remainder in fee of the purchaser (*f*).

But a power given to the owner of a particular estate is merged

Extinguishment or merger.

(*d*) *Per* Lord Eldon, *Maundrell* v. *Maundrell*, 10 Ves. 255.

(*e*) 3 & 4 Wm. IV. c. 105, s. 14. *Ante*, p. 210.

(*f*) 2 Da. i. 185; and see form, p. 239.

or extinguished by his acquisition of the fee simple, and so is a power absolutely extinguished when the purposes for which it was originally created have ceased to exist. In the latter case, the power is said to be 'extinguished' rather than 'merged;' because, it was not intended to continue longer than required for the purposes of the settlement (*g*). But it subsists until all the trusts are exhausted, and till the whole estate is vested in fee in the person or persons entitled (*h*).

Powers of revocation.

Certain powers, called powers of Revocation, are found in family settlements. Thus, a person may make a settlement of his property by deed in a given form, but may desire to reserve to himself the power of altering in some respects the course of settlement prescribed by the deed, or it may be entirely to extinguish it:—for instance, in a marriage settlement the settlor may wish to reserve to himself power, in case of there being no issue of the intended marriage, for the survivor of the husband and wife to revoke the trusts declared (*i*); or, in a voluntary settlement, *e.g.*, by a brother in favor of his brother, his brother's wife, and children, the settlor may wish to make provision for putting an end to the settlement (*k*), and similarly in a voluntary postnuptial settlement by a man in favor of his wife and children (*l*). That the settlor may be invested with such authority, there would be introduced into the deed a power to revoke its provisions. As regards voluntary settlements, it is said by Mr. Davidson (*m*):—

"They are mostly executed with the view to their having a *quasi*-testamentary operation, and being revocable if the settlor should desire to make other dispositions; and the draftsman receiving instructions for an instrument of this kind should therefore provide for the revocation of the settlement, unless he is satisfied that it is the settlor's own wish to make it irrevocable. In many cases voluntary settlements, in form irrevocable, have been treated as revocable, or set aside, on the ground that a power of revocation ought to have been inserted."

This is generally on the suggestion that the person making it was under influence. The absence of such power, and the fact that the attention of the settlor was not called to that absence are, however, merely elements in considering its validity; it may be valid notwithstanding (*n*).

(*g*) Farwell on Powers, 23.
(*h*) *Ib.*, 23 and 24.
(*i*) 2 Prid. 284.
(*k*) 3 Da. ii. 975.
(*l*) See Da. Conc. Prec. 436; see also 2 Prid. 348.
(*m*) Vol. iii. pt. i. p. 695.
(*n*) *Hall* v. *Hall*, L. R. 8 Ch. Ap. 430.

Chap. XI.

At common law, an estate once granted could only be 'defeated' or totally undone by virtue of a 'defeasance,' that is a collateral deed made at the same time with a feoffment or other conveyance, containing certain conditions upon the performance of which the estate then created might be defeated (*o*). But provisoes containing power of revocation, says Lord Coke (*p*), crept into voluntary conveyances, which pass by raising of uses, being executed by the Statute of Uses. Such proviso being coupled with a use, was allowed to be good, and not repugnant to the former estates (*pp*). In case of such a revocation, says Blackstone (*q*)—

> "The old uses were held instantly to cease, and the new ones" (if the power extended to the appointment of new ones) "to become executed in their stead. And this was permitted partly to indulge the convenience, and partly the caprice of mankind; who (as Lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards."

It should, however, be added, that the execution of a power cannot be revoked, unless a power of revocation be reserved by the instrument executing the power, although the instrument creating the power expressly authorises revocation (*r*). The only exception to this is that class of cases (*s*) by which appointments made to a younger child who afterwards becomes an eldest son are revoked, as having been made on a tacit condition (*t*).

And new appointment.

Where in addition to the power of revoking the old use, power is given to declare a new one, the power is called one of 'revocation and new appointment.' It has very commonly been had recourse to for the purpose of carrying out some of the subsidiary clauses of a settlement, *e.g.*, where power of sale and exchange, as it is called, was given; this was worked out by giving a power to revoke the old, and declare new uses of the lands sold or given in exchange, and to settle the lands purchased with the money arising from such sale or taken in exchange to the subsisting uses of the settlement (*u*).

Special Powers. Sale and Exchange.

The powers to sell and to exchange settled land, formerly given in settlements, whether by deed or will, to the trustees, are instances

(*o*) 2 Bl. 327.
(*p*) Co. Litt. 237*a*, ed. by Thomas, vol. ii. 123.
(*pp*) *Ib.*
(*q*) Vol. ii. 335.
(*r*) Farwell, 215.
(*s*) Of which *Chadwick* v. *Dolman*, 2 Vern. 528, is the first.
(*t*) Farwell, 216.
(*u*) See example, 3 Da. ii. 1018; or Da. Conc. Prec. 403.

of Special Powers; for working out such powers when given, provision was expressly made by the settlement, or, latterly, supplied by the Trustees, &c., Powers Act, 1860 (*x*). As we have seen (*y*), this Act has been repealed by the Settled Land Act, 1882 (*z*), and for the facilitating the transfer of land, and for the shortening of documents, powers to sell, lease, exchange, and partition, are made incident to the estate of every limited owner, and where the limited owner is an infant, or if the infant is in his own right seised or entitled in possession to the land, these powers are to be exercisable by the trustees (*a*). The Settled Land Act, 1882, came into effect from and after 31st December, 1882, but its operation is not confined to future settlements. Also, by the same Act (*b*), the additional power is given to trustees, where money is in their hands liable to be laid out in the purchase of land to be made subject to the settlement, of investing or applying the same as capital money under the Act at the option of the tenant for life or other limited owner.

Lease.
Partition.

Following the principle that under the ordinary power of sale and exchange, trustees cannot sell the lands without the timber, and allow the *cestui que trust* unimpeachable for waste to sell the timber, for to do so would be to prejudice the reversioner (*c*), it was decided so lately as 1861, that under such power trustees could not sell land reserving the minerals (*d*). Sir J. Romilly, M. R., said :—

Minerals.
Timber.

"The principle is this:—The power must be so exercised, as not to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised. The mines are a part of the *corpus*, which the tenant for life, being unimpeachable for waste, is entitled to win and sell, and thus obtain the profits of; but the surface land being sold, the purchase-money is to be reinvested in land, and if an estate with valuable minerals under it were found to be the most eligible mode of investment, the tenant for life would get the minerals from under the two estates. It is clear that this could not be prevented, for the Court could not refuse to allow the purchase-money to be invested in the purchase of an estate with minerals under it, if such a purchase were valuable and beneficial for the persons entitled; neither could it restrict the purchase to lands of which the mere value was agricultural, or if not, prevent the tenant for life from working the mines.

"It is obvious that the Court could not exact from the tenant for life

(*x*) 23 & 24 Vict. c. 145, pts. i. and iv.; see forms, applicable to each case, Da. Conc. Prec. 403 and 412.
(*y*) *Ante*, chap. i. pp. 54 *et seq.*
(*z*) 45 & 46 Vict. c. 38, s. 64.
(*a*) Ss. 59 and 60.
(*b*) S. 33.
(*c*) *Cholmeley* v. *Paxton*, 3 Bing. 207.
(*d*) *Buckley* v. *Howell*, 29 Bea. 552.

Chap. XI.

any promise not to purchase any land of that description, nor, if exacted, enforce it. It is the same in this case as in that of timber; no promise or undertaking as to reinvestment would be of any avail, nor could it be enforced by this Court.

"I think the principle clear, that in selling a piece of this land, you must sell the whole of the minerals under it as well as the surface of the land itself."

In consequence of this decision, the Confirmation of Sales Act (*e*) was passed, which first cured the invalidity of sales, under such power, of the land separately from the minerals, or of the minerals separately from the land, excepting sales declared invalid, or sales as to the validity of which litigation was pending (*f*); and, secondly, for the future empowered trustees so to sell with the sanction of the Court of Chancery, to be obtained in a summary way, and such sanction once obtained for any part is to render further application in respect of other parts unnecessary (*g*). The necessity, however, of applying to the Court is ordinarily avoided by the insertion of a power to sell the minerals apart from the surface, or *vice versâ*, wherever minerals are known or supposed to exist (*h*).

Now it is provided that on sales of settled estates authorised by the Court under the Settled Estates Act, 1877 (*i*), any earth, coal, stone, or mineral may be excepted, and (*k*) that any timber (not being ornamental timber) growing on any settled estates, may be sold, if the Court deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement.

And later, the Settled Land Act, 1882 (*l*), enacts that on a sale, exchange, or partition under the Act, any reservation with respect to mines and minerals may be made (*m*), and that a tenant impeachable for waste in respect of timber may sell timber ripe for cutting on consent of the trustees or an order of the Court (*n*).

Reference should here also be made to the enactment in the Act to further Amend the Law of Property, 1859 (*o*), preventing

(*e*) 25 & 26 Vict. c. 108.

(*f*) S. 1.

(*g*) S. 2; and 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34, § 3.

(*h*) Dart's V. & P. 1185; see form, 3 Da. ii. 1019.

(*i*) 40 & 41 Vict. c. 18, s. 19.

(*k*) S. 16.

(*l*) 45 & 46 Vict. c. 38; see *ante*, chap. i. pp. 49, 55, *et seq.*

(*m*) S. 4 (6), and s. 17.

(*n*) S. 35.

(*o*) 22 & 23 Vict. c. 35, s. 13. This was enacted in consequence of the decision in *Cockerell* v. *Cholmeley*, 1 Russ. & My. 418; and see *Cholmeley* v. *Paxton*, 3 Bing. 207.

the mistaken payment to the tenant for life in respect of the timber, &c., invalidating a sale; it provided as follows:—

> S. 13. "Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest, under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him."

Power over the use.

In modern times, powers ordinarily take effect under the operation of the Statute of Uses; for example, if property be conveyed to such uses as A. shall appoint, A. has the power of appointing the use. If it be conveyed to the use of a parent for life, with remainder after the termination of his life estate to the use of his children in fee, but with a power to A. to grant leases, any lease granted by A. under the power would be an appointment of the use to the tenant for a term of years.

Common Law Powers.

But powers in fact existed, as a mode of dealing with property, antecedently to the Statute of Uses, and under the old common law of the country powers of this description still exist, and are termed common law powers (*p*). Thus a direction in a will that A., who took no estate in the lands, should have a power of sale over them, would be a common law power. Under an exercise of the power, A. might pass the estate to a purchaser, and vest it in him as effectually as if the testator had himself devised it to the purchaser direct; although the estate descended to the heir-at-law until the power was executed (*q*). For instance ~~(*inter alia*),~~ the will of the testator and his seisin of the property to be conveyed would be recited, and he would convey in exercise of the power under the will and for all the estate of the testator. The

(*p*) See *post*, pp. 330 *et seq.*

(*q*) Farwell, 1.

Chap. XI.

mode of conveyance in such case is by 'bargain and sale,' not operating under the Statute of Uses, like that previously considered, but in exercise of a common law authority (*r*). All powers having reference to personalty are in the nature of common law powers—that is to say, at all events, the Statute of Uses not applying to them, they cannot take effect by way of use.

Equitable Powers.

Mortgages, as we have seen, ordinarily contain a power of sale in case of default in payment of the mortgage money, or the power is supplied by Act of Parliament (*s*); but this is an equitable power only, thus to deal with the ownership. The estate itself or legal interest does not pass under an exercise of the power; it can only pass by an actual conveyance, which equity will compel (*t*). The mortgagee, his executors, administrators, and assigns (not heirs), are empowered to sell, and it is declared that whoever is entitled to give a discharge for the money may exercise the power. In regard to mortgages executed since the 31st December, 1881, the power is supplied by the Conveyancing and Law of Property Act, 1881 (*u*). It has also been usual to provide that whoever has the legal estate, if different from those entitled to the money, shall convey the estate as the persons entitled to the money shall direct (*x*). This is now unnecessary, for, as we have seen (*y*), by the same Act (*z*) mortgage estates are made to devolve on the personal representatives of the mortgagee in cases of death after 31st December, 1881.

Restrictions on alienation by conveyance not applying to appointments.

We have instanced the case of the donee of the power of appointment exercising the power in his own favor. He might also exercise it in favor of his wife (*a*). So may a married woman exercise such power given to her in favor of her husband, and she may exercise such power without her husband's consent. The statutory power, too, of an infant to make a settlement on marriage extends to the property over which he or she has a power of appointment (*b*). Otherwise, however, an infant cannot exercise a power over real estate (*c*) unless it is a power simply

(*r*) 2 Da. i. 179; *ante*, p. 286. See a form of bargain and sale of copyholds under such circumstances, given in 2 Da. i. 374, which might easily be adapted to the case of freeholds.

(*s*) *Ante*, p. 182.

(*t*) Farwell, 2.

(*u*) 44 & 45 Vict. c. 41, ss. 19—21.

(*x*) 2 Da. ii. 308.

(*y*) *Ante*, p. 199.

(*z*) S. 30.

(*a*) See *ante*, pp. 233, 255.

(*b*) 18 & 19 Vict. c. 43, ss. 1 and 2. *Ante*, p. 112.

(*c*) This is not so in the case of personal estate, at any rate if there is an intention shown that the infant may exercise it (see *In re D'Angibau*, L. R. 15 Ch. D. 228).

collateral—that is, given to one who has no interest whatever in the property over which it extends (*d*).

II. Powers:—

Powers operating under the statute are either—(1), Collateral, or (2), Relating to the Land (*e*).

1. Collateral.

A power 'collateral' is a bare power given to a mere stranger, who has no interest in the land—*e.g.*, a power of sale and exchange in a settlement given to trustees who have no estate in the settled lands.

2. Relating to the land.

A power 'relating to the land' is a power given to some person having an estate or interest in the land over which it is to be exercised. It is either 'appendant' (or 'appurtenant'), or 'in gross.'

a. Appendant.

It is 'appendant' when the estate created by its exercise overreaches and affects the estate and interest of the donee of the power.

b. In gross.

It is 'in gross' when the estate so created is beyond, and does not affect the estate or interest of such donee, but notwithstanding is annexed in privity to it, and takes effect in the appointee out of an interest vested in the appointor; thus, a power of (*f*) jointuring given to a tenant for life is in gross, for it commences from the death of the husband. A power of leasing in possession in the same person is appendant (*g*).

Extinguishment or suspension and release.

The distinction between powers 'collateral' and those 'relating to the land' is important with respect to their extinguishment or suspension and release. For a power simply collateral could not be extinguished or suspended by any act of the donee, or of any other persons, with respect to the land; nor could it be released where it was to be exercised for the benefit of another (*h*). On the other hand, powers relating to the land, appendant or in gross, may be suspended or destroyed by the donee (*i*). Sir John Leach, V.C., thus expressed it (*k*):—

"Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

"It must be equally clear that it may be released, where it is for his

(*d*) *Hearle* v. *Greenbank*, 3 Atk. 695.

(*e*) See Farwell on Powers, 8; and Sugden on Powers, 46. By Hale, C.B., they were classified into (1) 'simply collateral,' (2) 'not simply collateral.' See also Tudor's L. Ca. on Real Prop., notes to *Edwards* v. *Slater*, 377.

(*f*) See Da. Conc. Prec. 476, for instance of power.

(*g*) Farwell on Powers, p. 9.

(*h*) *Ib.*, p. 10.

(*i*) *Ib.*, p. 13.

(*k*) In the leading case of *West* v. *Berney*, 1 Russ. & M. 435.

Chap. XI.

own benefit, as a power to charge a sum of money for himself. In such case his joining in a conveyance of the land clear of the charge, would be a release. I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate. I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power."

Reference also may be usefully made to another leading case before the same judge (*l*) :—

The plaintiff's title depended upon the will of Edward Wise, who devised the property to Charles Brown for life, with remainder to the use of such child and children of Charles Brown, and him surviving, in such parts, &c., as he should by deed or will appoint; and in default of appointment to the use of the first son of C. Brown, and the heirs of the body of such son, with remainders over.

The first son of Charles Brown, after attaining his majority, joined with his father in suffering a recovery, under which the plaintiff claimed.

It was contended by Mr. Sugden (*m*) that the title was defective, by reason that the power given to Charles Brown to appoint to his children, was not extinguished by the recovery; and he argued, that if a general power to appoint for the benefit of the owner could be extinguished by a recovery, yet that a particular (*n*) collateral power, not being an interest in the appointor, or to be exercised for his benefit, but in the nature of a trust to be executed for the benefit of others, could not be so extinguished; and he distinguished the case of a power to jointure, which might be used for the parties' benefit, and enable him to obtain a larger portion with his wife. He referred also to *West* v. *Berney* (*o*).

Sir John Leach, V.C., said :—

"That in *West* v. *Berney* it appeared to him, as the result of the authorities, that every power reserved to a grantee or devisee for life,

---

(*l*) *Smith* v. *Death*, 5 Madd. 371.

(*m*) Afterwards Lord St. Leonards.

(*n*) *i.e.*, in favor of particular class (see *post*, p. 305).

(*o*) 1 Russ. & M. 431.

though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, might be extinguished. That such a grantee or devisee could deal with the estate in respect of his freehold interest; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to defeat his own grant. That it made no difference that here the power was a particular power in favor of children; that *King* v. *Melling* was a particular power in favor of the wife; that such a power could not be called a trust, for the alleged *cestui que trust* could not compel the execution of it, and being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option."

Now, by the Conveyancing and Law of Property Act, 1881 (*p*), a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise the power.

And by the Conveyancing Act, 1882 (*q*), it is further provided that a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power, and on such disclaimer the power may be exercised by the other or others of the donees of the power, unless the contrary is expressed in the instrument creating the power.

Powers:—
1. Exclusive.

Reference has been made to powers of appointment given to parents in favor of their children. A power of appointment among a class which authorises the donee to select one or more of such class to the exclusion of the others is called an Exclusive power; on the other hand, one which does not allow the exclusion of any one entirely is called a Non-exclusive power. In settlements of real estate, the power is created by direct limitation (following the limitations of the preceding life estates) to the use of the child, or of all, or such one or more exclusively of the others or other of the children of the marriage, as the donee of the power shall appoint. Thus:—

2. Non-exclusive.

"To the use of the child or of all or such one or more exclusively of the others or other of the children of the said intended marriage for such estates or estate interests or interest and if more than one in such shares and with and subject to such charges powers provisoes conditions restrictions limitations and remainders over for the benefit of the said children or some or one of them and in such manner as the said (parents) shall by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment appoint" (*r*).

(*p*) 44 & 45 Vict. c. 41, s. 52.
(*q*) 45 & 46 Vict. c. 39, s. 6.
(*r*) 3 Da. ii. 1236; Da. Conc. Prec. 399, short form.

Chap. XI.

Under the law prior to the statute next mentioned, it was held in equity, that the donee of a non-exclusive power must appoint a substantial share to each object of the power; though at law, if anything, however small, were appointed, the requirement of the power was satisfied. But as the question, what was a substantial share, led to constant litigation, the Act to Alter and Amend the Law relating to Illusory Appointments (*rr*) was passed in 1830 at the instigation of Lord St. Leonards. Thereby it was enacted that—

> S. 1. "No appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property real or personal amongst several objects shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power."

On the old law and the new enactment, it was said by Jessel, M.R., in a recent case (*s*):—

"Under the old law, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. The power was called a non-exclusive power, and it was considered that the author of the settlement intended everybody to take a substantial share. That was not according to the literal wording of the power, but it made sense of it: because if the appointment of a farthing would do, then, on the principle "*de minimis non curat lex*," it would make every non-exclusive power an exclusive power. However, that doctrine was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say, without resorting to litigation, what the least sum was which the appointor was authorised to appoint. That inconvenience led to an alteration of the law, and the Legislature, under the guidance of a very great lawyer, made this very remarkable alteration: it directed that in future no appointment might be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed, but it did not alter the construction of the power. The consequence of this remarkable alteration of the law has been this, that where the power is non-exclusive if the appointor forgets to appoint a

---

(*rr*) 11 Geo. IV. & 1 Wm. IV. c. 46.

(*s*) *Gainsford* v. *Dunn*, L. R. 17 Eq. 406.

shilling, or even a farthing, to every object of the power, the appointment is bad, because some one is left out. One would have imagined that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get."

Within a few months of these remarks being made, a new statute (*t*) was passed under the guidance of another very great lawyer (*u*).

Thereby, after reciting that—

> "By deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded or some one or more of the objects of the power cannot be excluded by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power, or to each object of the power who cannot be excluded:
>
> "And instruments intended to operate as executions of such powers are frequently invalid in consequence of the donee of the power appointing in favor of some one or more of the objects of the power to the exclusion of the other or others, or some other or others of such objects, and it is expedient to amend the law so as to prevent such intended appointments failing."

It was enacted—

Appointments to be valid notwithstanding one or more objects excluded.

> "1. That no appointment, which, from and after the passing of this Act, shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power.
>
> "2. Provided always, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

But in regard to appointments made before the passing of this Act, *i.e.*, the 30th July, 1874, it is still necessary to consider the rules for construing a power exclusive or non-exclusive. Where a testatrix bequeathed a fund to her daughter for life, and after her death to and amongst her other children or their issue in such

(*t*) 37 & 38 Vict. c. 37. (*u*) Lord Selborne.

Chap. XI.

parts, shares, and proportions, manner and form as her daughter should by deed or will appoint; it was held that the power was exclusive. In that case (*y*) Jessel, M.R., said :—

"The real question is, what is the law upon the point as to whether this power is exclusive or not? Now, I am not going to lay down any new law on the subject of exclusive appointments, but I will take the law as enunciated in the most recent text-book on the subject—Mr. Farwell's work on Powers, published in 1874. Mr. Farwell says: "Each case must depend upon the intention expressed in the particular instrument creating the power; no general rule can be laid down, except perhaps that the words 'all and every' are mandatory, and make it necessary that each object should have a share and that 'such' authorises exclusion, unless a contrary intention appear." I have no doubt that is the law. The Court must have regard to the intention expressed in the instrument creating the power, and that doctrine was not disputed at the bar. I must, therefore, ascertain the intention of the testatrix in this case. In enquiring what is the meaning of the words she has used, it is no answer to say that in the case of some other instrument containing similar but not identical expressions, it has been held that the donee of the power was not authorised to exclude any objects of the particular class. The question is one of construction. What is the general rule? I must first look at the instrument before me to see whether there are any words which prevent this power from being read as an exclusive power. There have been cases in which such words as 'all and every,' or 'unto or among,' have been held not to authorise an exclusive appointment. But the use of such expressions is not conclusive. In cases of this description, one often finds words which receive different interpretations, according as they present themselves differently to the mind of the Judge who is endeavouring to construe the particular instrument before him, but a long course of decisions shews that merely to rely upon the particular words used is not sufficient. It is not a right or sound canon of construction to say that such and such a word has been held in such and such a case not to be sufficient to make the power exclusive. First read your instrument, and then see what meaning is to be attached to the words."

III. Exercise of, like dealings with estate.

Powers must be exercised under the limitations which would attach on any dealing with the ownership or seisin of an estate. Thus, a power cannot be exercised so as to create a perpetuity, or tie up an estate longer than the limitation prescribed by law —that is to say, a life or lives in being and twenty-one years after, with an additional period for gestation, if it actually exists; nor to create an estate in mortmain and so on.

Estates take effect under instrument

The limitations created under the exercise of powers are treated as taking effect under the instrument creating the power itself.

(*y*) *In re Veale's Trusts*, L. R. 4 Ch. D. 64.

Thus, in a conveyance to such uses as A. shall appoint, A.'s appointment only directs the use; and the estate created by him takes effect as though it had been limited in the deed creating the power. Thus, suppose in the deed itself the estate had been limited to A. for life, with remainder to such uses as he should appoint, and he were to appoint to B. in fee; this would be just the same as if in the deed itself the limitation had been to A. for life with remainder to B. in fee.

creating the power.

As a consequence of the general rule (namely, that the appointee takes under the original deed), it has been determined, says Lord St. Leonards (*z*), that—

Conveyance on fee-farm rent.

"Where an estate was conveyed to such uses as A. should appoint, and in default of appointment to himself in fee, yielding and paying a fee-farm rent, which he covenanted to pay accordingly; and afterwards, by virtue of his power, he conveyed the estate to a purchaser, such purchaser was not subject to the covenant for payment of the rent, for although the covenant ran with the land in the first instance, yet it ceased to do so in the hands of the purchaser, because he did not take the interest of the original grantee, but took as if the original conveyance had been made to himself. This decision leads to the observation, that wherever a purchaser is to enter into a covenant, which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance to himself in fee, and should not permit the estate to be limited to the usual uses to bar dower."

Perpetuities:—
1. General powers.
2. Special powers.

When the power is what is termed a 'general power,' as in the case of a power to A. to appoint generally without restriction in his choice of objects, in considering the application of the rule against perpetuities to him, he is regarded as absolute owner of the property—in other words, the period from which the rule against perpetuities is to be reckoned as commencing to run, is from the instrument executing the power (*a*). But when the power is a 'particular' or 'special' power—that is, where the objects of it are specified persons or classes, the donee cannot create any estate which might not have been created by the instrument containing the power (*b*).

To quote Mr. Lewis (*c*):—

"A particular power may embrace objects of any degree of remoteness; *i.e.*, such a power will not be void, because it attempts to authorise an appointment to persons, not necessarily born, or the creation of

(*z*) Sugden on Powers, 473.

(*a*) Notes to *Cadell* v. *Palmer*, Tudor's L. Ca. on R. P. 485.

(*b*) Farwell on Powers, 226; and 3 Da. i. 154, note.

(*c*) Lewis on Perpetuities, p. 487 *et seq.*

Chap. XI.

interests, not necessarily vested, within the fixed boundaries of perpetuity. The power itself not giving any right, or creating any definite interest, no danger ensues from the range of choice or selection extending to objects, whom the law would not allow to participate in an express gift. The possible exercise of the power, in favor of such objects, only answers to the chances of abuse, which attend the power of dominion possessed by a person absolutely entitled, but which have never been supposed to justify the total deprivation of that power, or to disallow its exercise within temperate limits. Did the rules of law require an exercise of the power in favor of every person answering to the description of the objects embraced by it, or did the conferring a power of appointment among a class of persons, operate as an implied gift to all the members of that class, in default of the exercise of the power, arguments would exist against extending a power to persons who could not legally participate in any direct gift, contemporaneous with, or made instead of, the power. The security against the violation of the laws of remoteness consists in the very discretion and latitude of choice with which the donee of the power is invested by it, and in the failure and nullification of his dispositions, consequent upon an abuse of that discretion.

* * * * * *

"But, although there is no necessity to confine the objects of a power to those who might be legally included in an express gift of the same date, it is a long-established rule that no estate or interest can be limited under a particular power, which would have been too remote, if limited in the deed or will creating the power. The office of discrimination belongs to the donee of the power; and, if properly discharged, by the appointment of interests which would have been valid in the original instrument, the circumstance that the power embraced other objects too remote, will not affect the appointment; but if the appointment extend to persons, or create interests beyond the boundaries of perpetuity, as tested by their insertion in the instrument creating the power, the appointment fails.

"Thus, if A. have a power of appointment among the issue of B., and he appoint to all the children of a son of B., who was unborn at the date of the instrument creating the power, the appointment is bad; because the grandchildren of B., comprised in it, will not necessarily be born, within the period of a life in being and twenty-one years, computed from the date of the original settlement.

"But, if the appointment be to such of the children of B.'s son as shall be born during the life of the donee of the power, or within twenty-one years from his decease, or before the expiration of twenty-one years from the decease of any other person, or the survivor of any number of persons, living at the time of the creation of the power, it will be entirely free from objection, because such a limitation would have been valid if contained in the original settlement or will. And so, if the appointment be to the children of B. (he having none when the power was created), on their attainment of the age of twenty-five years, or other age above majority, it will be void, as too remote, inasmuch as, under such a limitation, if inserted in the deed creating the power, the vesting of the interests of the children might have been suspended for a longer period than a particular life or number of lives in being, and twenty-one years.

But if, by the appointment, the attainment of the required ages by the children of B. be confined to take place within the legal limits of remoteness, computed from the taking effect of the original will or settlement, it will be unobjectionable; as such restriction on the happening of the specified event, in itself too remote, would have sufficed to restrain its tendency to a perpetuity, if inserted in the instrument creating the power. It will be observed that, wherever the appointment is to the grandchildren or remoter issue of the person, in favor of whose issue the power was created, and the birth of the issue to take under the appointment is restricted to the period of twenty-one years after the expiration of any life or lives, the vesting of the interests of the issue must not be postponed beyond their birth, as the whole period of the perpetuity-boundary is absorbed by the contingency which surrounds the objects of the gift. If, therefore, it be desired to suspend the vesting of the shares of the issue till their majority, care must be taken to provide that the issue, who are included under the appointment, shall be born during the life of the donee of the power, or during the lives of any persons living at the time of the creation of the power, and the life of the survivor."

A good illustration of the above remarks is furnished by a recent case (*d*):—

By a marriage settlement, freehold property was conveyed to trustees to the use of the settlor, William Metford, for life, and after his death, "to the use of all or any one or more exclusively of the children, grandchildren, or other issue of William Metford" (to be born before the appointment was made), as he should by deed or will appoint, and in default to the uses therein declared. By his will, William Metford appointed the property to the use of his son, William E. Metford in fee, but in case William E. Metford should have no child who should attain the age of twenty-one years, the testator requested him to grant, appoint, or devise to the use of his (the testator's) grandson, W. M. Badcocke, in fee. The question arose on the sale of a portion of the property whether William E. Metford had an absolute fee simple in the estate, and could make a good title without the concurrence of W. M. Badcocke.

Malins, V.C., said:—

"The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power. Consequently, when William Metford made his will, it was the same as if the words he there used had formed part of the settlement, and as if the property had been conveyed by that settlement to trustees to the use of himself for life, with remainder to the use of his (unborn) son in fee, with a direction that in case his son should have no child who should attain twenty-one, then, that the estate should, after the son's death, go over to the

(*d*) *In re Brown & Sibly's Contract*, L. R. 3 Ch. D. 156. It was on a different point that the decision of the V.C. was dissented from by Jessel, M.R., in *In re Bellis's Trusts*, L. R. 5 Ch. D. 504.

Chap. XI.

settlor's grandson in fee. That is an attempt to make the property inalienable for a period which might extend to twenty-one years after the determination of the life of a person not in being at the date of the settlement. The law does not allow a man to tie up property for longer than a life or lives in being and twenty-one years; and this is clearly an attempt to do what is contrary to the law.

"My opinion, therefore, is, that the appointment by the testator to his son in fee is good, and the attempt to give the estate over is void. It is precisely the same as if a man were to give property to his son for life, and after his decease to his son's children, as tenants in common in fee, with a proviso that if any of the children should die under twenty-five the property should go over. In that case, the proviso carrying over the shares would be void. The gift to the son in fee is therefore good, and the executory devise over is void."

Excessive execution.

In the above case the attempt to make a gift over was what is called an 'excessive execution' of the power. The principle upon which Courts deal with excessive executions of powers was laid down by Sir Thomas Clarke, M.R. (*e*), viz.:—

"That where there is complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad."

Valid appointment to persons not objects of the power.

A valid appointment may, however, be made to persons not objects of the power, with the concurrence of those who are objects; thus, upon the marriage of a child, a parent with power to appoint among his children, may, with the consent of the child, appoint to the intended husband and the issue of the marriage, and the appointment will be valid in equity (*f*). Such an arrangement is regarded first as an appointment, and then as a settlement by the object of the power (*g*).

To separate use without power of anticipation.

A question has arisen whether, where there is a power of appointment among children, and in exercise of such power an appointment is made among daughters to their separate use without power of anticipation, the appointment can be upheld or is void for remoteness. There are decisions that the appointment, so far as it is to their separate use, is good, but so far as it restrains anticipation of the income it is excessive and to be rejected. But the correctness of these decisions is very doubtful,

---

(*e*) In 1755, in *Alexander* v. *Alexander*, Tudor's L. Ca. on Real Prop. 401.

(*f*) Notes to *Alexander* v. *Alexander*, Tudor's L. Ca. on R. P. 412.

(*g*) See 2 Prid. 706.

and a Court of Appeal would probably hold the whole appointment to be good as intended to give the whole benefit to the daughters to the exclusion of any husband (*h*). In reference to this question, now, it should be noticed that, under the Conveyancing and Law of Property Act, 1881 (*i*), notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to be for her benefit, by judgment or order with her consent, bind her interest in any property (*k*).

Delegation of powers.

To the donee of a power, involving the exercise of personal discretion, *e.g.*, a power of leasing, the maxim applies, '*delegatus non potest delegare*,' the donee of the power only can exercise it, and not his attorney. But this maxim does not apply where the act is purely ministerial—*e.g.*, a deed may be executed by attorney (*l*) after the donee has approved the draft; nor does it apply to the case of a general power—*e.g.*, if a man has power of sale as absolute owner, he may sell by attorney. So where an estate stands limited to such uses as A. shall appoint, an appointment by A. to such uses as B. shall appoint will be valid and effectual to pass the legal estate (*m*).

Bankruptcy of donee.

Powers conferring a general ownership pass on the bankruptcy of the donee to his trustee, and are exercisable by him for the benefit of his creditors.

By the Bankruptcy Act, 1869 (*n*), it is enacted that when an order has been made adjudging a debtor bankrupt, the property of the bankrupt shall become divisible among his creditors, and for the purpose of effecting such division a trustee is to be appointed. Then the property of a bankrupt, divisible among his creditors, is made to comprise—

S. 15, § 4. "The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy, or during its continuance, except the right of nomination to a vacant ecclesiastical benefice."

On the appointment of the trustee, the property of the bankrupt vests in the trustee (*nn*); and the trustee is empowered—

(*h*) See *per* Jessel, M.R., in *In re Ridley*, L. R. 11 Ch. D. 645. This case should also be consulted for the discussion by the M.R. of the doctrine of restraint on anticipation. *Ante*, p. 118.

(*i*) 44 & 45 Vict. c. 41, s. 39.

(*k*) See *Hodges* v. *Hodges*, W. N. (1882), p. 53.

(*l*) As to the execution now of deeds and instruments under power of attorney, see *post*, p. 316.

(*m*) Farwell on Powers, 357 *et seq.*

(*n*) 32 & 33 Vict. c. 71, s. 14.

(*nn*) S. 17.

Chap. XI.

S. 25, § 5. "To exercise any powers the capacity to exercise which is vested in him under this Act."

Judgment debts of donee.

Under the provisions of 1 & 2 Vict. c. 110, the right of a creditor to take his debtor's property under a writ of *elegit* (*o*), is extended to estates over which he has a general power of appointment, or, as it is expressed in the Act (*p*), over which he has "any disposing power which he might, without the assent of any other person, exercise for his own benefit" (*q*). But the lands will not be bound by any judgment entered up after 29th July, 1864, until actually delivered in execution (*r*).

General power of appointment—Will.

Freehold lands over which a testator has a general power of appointment, and which he exercises by will, are assets for payment of his debts, on the ground that the power gave him an interest in the land within the meaning of 3 & 4 Wm. IV. c. 104, which made any estate or interest in lands, freehold and copyhold, assets for the payment of debts (*s*).

In a recent case property was settled on a married woman for her separate use for life, with remainder to such persons as she should by her will appoint, with remainder in default of appointment to her children. She made a testamentary appointment in favor of her daughter. The creditors sought a declaration that the property over which she had a testamentary power of appointment formed part of her separate estate. Hall, V.C., held that the property appointed became assets for the payment of her debts as if it were her separate estate (*t*).

It has since been enacted by the Married Women's Property Act, 1882 (*u*) that the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under the Act (*x*).

By the Wills Act (*y*), in reference to general (but not special) powers, it is enacted (*z*) that—

(*o*) *Ante*, p. 103.

(*p*) 1 & 2 Vict. c. 110, s. 13.

(*q*) It would seem that these words exclude a power of testamentary appointment (Dart, 463, note).

(*r*) 27 & 28 Vict. c. 112: *ante*, p. 103. As to what is an actual delivery in execution, see *Ex parte Evans*, 11 Ch. D. 691: *ante*, p. 77.

(*s*) *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; and Sugden on Powers, 474.

(*t*) *In re Harvey's Estate*, L. R. 13 Ch. D. 216.

(*u*) 45 & 46 Vict. c. 75, s. 4.

(*x*) *Ante*, p. 120.

(*y*) 1 Vict. c. 26, s. 27.

(*z*) As to the effect of a general clause in a will, which revokes all former wills, revoking a prior testamentary appointment, see *Sotheran* v. *Dening*, L. R. 20 Ch. D. 99.

A general gift shall include estates over which the testator has a general power of appointment.

S. 27. "A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will" (*a*).

Under the previous law it was necessary to show the intention to exercise the power. The law was thus stated by Abbott, C. J. (*b*).

"The rule has been expressed by Lord Thurlow in the following words: "To execute the power, it must be impossible to impute to the testator any other intention than that of executing it;" the doctrine, he says, is not by any case carried further than this. The distinction most frequently occurring, and which serves for illustration, as well as application of the rule, is this: if a will contain a devise of all the testator's lands generally, and he has some lands upon which the will may work by his interest, the law will attribute the will to his interest; and land of which he has only a power to devise will not pass. So, if the will be of all his lands in a county or place named, and he has lands of his own therein. On the other hand, if the testator has no lands, or none in the county or place named, upon which the will may work by his interest, there the law will attribute the will to his power, and will infer that he intended to execute his power; because, if that be not done, the will will be void, either wholly or so far as respects the county or place named."

And such is still the rule where the power is special—that is, to be exercised only in favor of particular individuals or classes of persons (*c*).

IV. Execution

Sometimes the exercise of the power is confined to a particular description of instrument; for example, the instrument may be prescribed to be a deed, or it may be prescribed to be a will. At other times certain formalities are attached to its execution;

(*a*) On the subject of intention, see *In re Pinède's Settlement*, L. R. 12 Ch. D. 667; *Boyes* v. *Cook*, L. R. 14 Ch. D. 53; *In re Clark's Estate*, L. R. 14 Ch. D. 422; and *Chandler* v. *Pocock*, L. R. 16 Ch. D. 648.

(*b*) *Denn* v. *Roake*, 5 B. & Cr. 731.

(*c*) Hayes and Jarman on Wills, p. 52.

Chap. XI.

for instance, it may be required that the instrument of execution should be attested by a given number of witnesses, say not less than two or three. In all such cases it was requisite that the instrument should not only be of the prescribed nature, but also be executed with the prescribed formalities. Thus, not only a power to be executed by deed could not be executed by will, or *vice versâ*, but a power requiring the presence and attestation of three witnesses could not be exercised by an instrument executed in the presence of two only.

By deed.

Now as regards deeds executed after the 13th August, 1859, it is provided by the Act to further Amend the Law of Property (*d*), that—

Mode of execution of powers.

S. 12. "A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution, or attestation, or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise, than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

By will.

Thus, also under the Wills Act (*e*), whatever may be the requirements of the instrument creating the power, an execution of the will exercising the power in conformity with the provisions of the Act dispenses with the necessity of any further compliance with these; and the Act provides that no appointment made by will in exercise of any power shall be valid unless executed in the manner required by the Act.

But where a power of appointment was given to a woman "by any instrument in writing to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses," and she devised by her will "all her real and personal

(*d*) 22 & 23 Vict. c. 35, s. 12. (*e*) 1 Vict. c. 26, s. 10.

estate over which she had a disposing power," it was held not to be a good execution of the power, notwithstanding the Wills Act (*f*). Lord Westbury, L.C., said:—

"If a power be created to be executed by a deed or instrument in writing, although the words seem to indicate instruments *inter vivos* only, yet it is settled that it may be well executed by will. The reason is, that the will literally answers the description of an instrument in writing; so, if either before or since the Statute of Wills (*g*), a power is created to appoint real estate by deed or will, to be respectively signed, sealed, and delivered in the presence of and attested by three credible witnesses, it is clear that a will executed in manner prescribed by that statute would be a good execution of the power. This is by force of the 10th section of the statute, and not on the ground that the will answers to the description in the power. In the present case the power created in December, 1841, is to be executed by an instrument in writing, signed, sealed, and delivered in the presence of and attested by two credible witnesses; and it is contended that a will duly executed in conformity with the statute, but not sealed, is not an instrument by which the power may be duly exercised. But the power is not in terms a power of appointment by will, and whether it has been duly executed by a will or not depends on the inquiry whether the will answers to the description of the required instrument contained in the power. This the will does not do, if one of the requisite solemnities be wanting, and it is clear that the statute does not make it answer the description: wherever the power is in terms, a power to appoint by will, and the will is required to be under seal, the statute applies, and makes the requisition null, but it does not apply where the power to appoint is by an instrument in writing under seal, for no will can execute a power that requires an instrument in writing under seal, unless the will answers the description of such an instrument, which a will without a seal does not. Attention to the original principle on which a will was held to be a good execution of a power of appointment, by any instrument in writing—namely, that the will answers the description in the power, would have prevented all misapprehension. The statute applies to powers requiring specifically a will with the solemnities of sealing, in addition to the solemnities rendered necessary by the statute, and in such case it declares that a will without such additional solemnities shall be sufficient; but it does not touch the case of a power requiring an instrument in writing, signed, sealed, and delivered; in such a case the only question is, whether the will be such an instrument, and no help can be obtained from the statute. The difficulty, as is usual, does not arise from any uncertainty as to the principle, but from the reports of conflicting and inconsistent decision which is now the fruitful cause of litigation."

Defective execution, when relieved in equity.

There are certain cases in which the peculiar jurisdiction of a Court of Equity being invoked, an execution which would have

(*f*) *Taylor* v. *Meads*, 13 W. R. 394, and 34 L. J. Ch. 203: see *ante*, p. 116.

(*g*) 1 Vict. c. 26.

Chap. XI.

been defective at law is sustained on behalf of persons standing in certain favored positions, as purchasers, creditors, the wife and children of the donee of the power, charities, &c. Thus, suppose a person having a power of appointment by an instrument to be executed in the presence of two witnesses were to make an appointment in favor of any one of these favored objects by a deed executed in the presence of one witness only; or a person having a power of appointment by deed or will were to write a memorandum expressing his wish and intention with regard to it and were to die without having legally executed it. Equity would support the execution, provided it sufficiently appear that there was an intention on the part of the donee to give the property which he had power to dispose of (*h*). Similarly a mere agreement, if for valuable consideration, is in equity treated as a defective execution, and the Court will supply the defect (*hh*).

Defective execution relieved by statute in case of Leases.

A special statute has been passed for granting relief against defects in leases made under powers of leasing, in certain cases—namely, 12 & 13 Vict. c. 26, and c. 110 (*i*).

Lessor's covenants in Leases under powers.

By the Conveyancing and Law of Property Act, 1881 (*k*), all covenants which, as against the remainderman, the grantor of a lease under a power has power to enter into, are made legally binding on the successors in title of the grantor.

V. Power of attorney.

A power of attorney is an authority from one person to do an act in the turn, stead, or place of another; as, in the case of a feoffment, a letter of attorney to deliver seisin to the feoffee, which was bound to be by deed, and to be executed in the lifetime of the donor (*l*). Hence it came to be necessary in making out title to property that, where any deed had been executed by attorney, the power should be produced and evidence given of the principal having been alive at the time of its being acted upon (*m*). Where it has not been given for valuable consideration, it is also revocable at any time by the donor, and is liable to be suspended by his mental incapacity; therefore, in every such case, it was further necessary that inquiry should be made whether the power had been revoked prior to its apparent or

Requirements for validity of exercise.

(*h*) Sugden on Powers, chap. xi.; and see *Kennard* v. *Kennard*, L. R. 8 Ch. App. 227.

(*hh*) *In re Dykes' Estate*, L. R. 7 Eq. 337.

(*i*) Amended by 13 Vict. c. 17.

(*k*) 44 & 45 Vict. c. 41, s. 11.

(*l*) Co. Litt. 51*b*, 52*b*; ed. by Thomas, vol. ii. 340.

(*m*) Note to *Smart* v. *Sanders*, 5 C. B. 917; and Dart's V. & P. 311, 312.

See Hallett & Martin 4 Jur. (N.S.) 624

proposed exercise (*n*). Where the conveyance, on sale or mortgage, is executed by attorney, the practice has been to retain, or deposit in the names of trustees at the risk of the vendor or mortgagor, the purchase or mortgage-money, until satisfactory evidence has been adduced of the validity of the power at the date of the execution of the conveyance (*p*).

Where a deed is executed under power of attorney, the principal and not the attorney is named as party to the deed, and the custom has been for the attorney to execute in the name of the principal, and the fact to be noticed in the attestation (*q*).

A married woman could not appoint an attorney to convey away her estate, and, therefore, any assurance of a married woman's interest under a power of attorney was inoperative (*r*).

The power cannot be delegated (*s*), nor can a deputy be appointed by the attorney, unless the deed conferring the power expressly authorises such delegation or appointment (*t*).

Law of Property Amendment and Trustees Relief Act.

The Legislature first interfered to afford protection to trustees and personal representatives, making payments or doing acts in pursuance of a power of attorney. It was enacted by the Act to further Amend the Law of Property and to Relieve Trustees (*u*) as follows:—

> S. 26. "No trustee, executor, or administrator, making any payment or doing any act *bonâ fide* under or in pursuance of any power of attorney, shall be liable for the moneys so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power of attorney."

This protection, as regards payments and acts done after 1881,

---

(*n*) *Ib.*, and 569.

(*p*) Dart, 661.

(*q*) Dart, 517 and 570; see 1 Prid. 284, for form.

(*r*) *Graham* v. *Jackson*, 6 Q. B. 839, *per* Patteson, J.; and Dart, 570.

(*s*) *Ante*, p. 309.

(*t*) See 1 Da. 476, note.

(*u*) 22 & 23 Viet. c. 35.

Chap. XI.

Conveyancing Acts, 1881, 1882.

has been extended to all persons acting *bonâ fide*, by the Conveyancing and Law of Property Act, 1881 (*x*). It is still, however, necessary, except in the cases provided for by the Conveyancing Act, 1882 (*y*), for a purchaser (*z*) to ascertain the facts of the principal being alive and the power being in force at the time of the conveyance being executed, for otherwise he would obtain only an equitable title (*a*). The cases provided for by the Act are in favor of purchasers, where the power of attorney has been created by an instrument executed after 1882, and either is given for a valuable consideration, and in the instrument creating it is expressed to be irrevocable (*b*), or, whether given for a valuable consideration or not, is in the instrument creating it expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument (*c*).

Again, by the Conveyancing and Law of Property Act, 1881 (*d*), it is enacted that the donee of a power of attorney may, at whatever date the power was created, if he thinks fit, use his own name and signature and seal, by the authority of the donor of the power. And further, by the same Act (*e*), as regards deeds executed after 1881, a married woman, whether an infant or not, is authorised to appoint an attorney to execute any deed, or do any other act which she might herself exercise and do.

By the same Act (*f*), provision is made for the deposit in the Central Office of the Supreme Court of Judicature, of any original instrument creating a power of attorney, at whatever date executed, and for inspection of it by any person, and for delivery of an office copy which without further proof is to be sufficient evidence of the contents of the instrument and of its deposit. Thus is removed any difficulty of obtaining production of the instrument, by any whose rights depend on the exercise of its power, which sometimes existed when it was a general power. Such powers are often used now by persons going to distant

(*x*) 44 & 45 Vict. c. 41, s. 47.

(*y*) 45 & 46 Vict. c. 39, ss. 8, 9.

(*z*) 'Purchaser' in the Conveyancing Acts, 1881, 1882, includes a lessee or mortgagee and an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for any property: 44 & 45 Vict. c. 41, s. 2 (viii.); and 45 & 46 Vict. c. 39, s. 1 (4) (ii.).

(*a*) See 44 & 45 Vict. c. 41, s. 4.

(*b*) 45 & 46 Vict. c. 39, s. 8.

(*c*) *Ib.* s. 9.

(*d*) 44 & 45 Vict. c. 41, s. 46.

(*e*) S. 40.

(*f*) S. 48.

countries (*h*). The object of this and the other provisions of the Legislature is to remove difficulties attending sales conducted under power of attorney, to allow of such powers being acted under with greater safety by the vendor's agent and by the purchaser, and so to facilitate transfer.

(*h*) See forms, 1 Da. 483 ; and short form, Da. Conc. Prec. 551, in a note to which he states that if a sale, mortgage, &c., be intended, there should generally be a deed of trust, not a mere power of attorney.

Chap. XII.

CHAPTER XII.

WILLS.

I. Will—differing from instruments *inter vivos.*

THE modes of assurance previously considered have been by instruments designed to give effect to some transaction between living parties, or as it is termed in Latin '*inter vivos.*' There remains to consider another mode—namely, devise by Will. The former deal in the lifetime of a party with property of his, or they create a present obligation; but a Will creates no obligation at all on the party making it, and may be recalled down to the very hour of his death—so long, that is to say, as mental competency remains; and, as it takes effect only from his death, it operates only on the property which he leaves behind him.

Will—testator—testament—devise—bequest.

It is called a Will because it does emphatically declare the intention or will of the party making it, termed the 'testator'; and it is also called a 'testament,' as signifying the manifestation or witnessing of his mind. Says Lord Coke:—

"'*Deviser*' is a French word, and signifieth *sermocinari* to speak, for *testamentum est testatio mentis, et index animi sermo.* So as 'to devise by his testament' is to speak by his testament, what his mind is to have done after his decease" (*a*).

In the strictest technical sense, the terms 'will' and 'devise' are appropriated to real estate; and the terms 'testament,' 'bequest,' and 'legacy,' are appropriated to personal estate; but the terms 'will,' 'testator,' and 'testamentary,' are commonly used with reference to either species of property (*b*).

Codicil.

Besides a will, there is an instrument of testamentary disposition termed a Codicil. Blackstone says (*c*):—

"A Codicil, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator."

(*a*) Co. Litt. 111*a*, ed. by Thomas, vol. ii. 636.

(*b*) Hayes & Jarman, 66, note.

(*c*) Vol. ii. 500.

Under the Wills Act (*d*), the word 'will' is expressed to extend to a codicil. Though occasionally added at the foot of the will itself, and on the same sheet of paper, it may alike be written on paper wholly distinct; and it requires a separate execution. It is so far part of the will itself, that both take effect from the death of the testator only—both speak as from that period; both together constitute the general enunciation of the testator's intention, and the codicil accordingly is read together with and construed as part of the will itself.

Where a codicil affects the dispositions of a will or prior codicil, it is an established rule not to disturb the dispositions of the antecedent instrument further than is absolutely necessary in order to give effect to the subsequent codicil. Thus, where a testatrix, having by her will given her fortune to be divided between R. N. and A. K., by her codicil after reciting the death of A. K., desired her fortune might be divided between R. N. and T. K., "for the use of their children, and when they come of age to have settled upon them"; it was held that, R. N. having died without having had children, the absolute gift to him of a moiety under the will took effect; the original gift was affected only so far as was necessary, in order to carry into effect the intention in his children's favor, and therefore, as he never had a child, was not in the result affected at all (*e*).

Codicils, as a rule, are, as pointed out by Mr. Davidson (*f*), objectionable except for simple purposes, such as the gift or revocation of a legacy, or appointment of trustees or executors; for, independently of the risk of the codicil being lost, there is often much difficulty in fitting the provisions of the codicil into the trusts or limitations of the will. If larger changes are contemplated, a new will should be made.

History.

Previously to the Statute of Wills (*g*), the owner of lands had no power over them of disposition by will direct; but he could only, having conveyed them to uses, declare the uses by his will, which were enforced in the Court of Chancery (*h*). The Statute of Uses (27 Hen. VIII. c. 10) having, by transferring the possession or legal estate to the use, destroyed this power of disposition by will, power of devising by will in writing was given to the

(*d*) 1 Vict. c. 26, s. 1.
(*e*) *Norman* v. *Kynaston*, 3 De G. F. & J. 29; and see 1 Jarm. on Wills, 176.
(*f*) Vol. iv. 593, note.
(*g*) 32 Hen. VIII. c. 1.
(*h*) *Ante*, pp. 88, 89.

Chap. XII.

owners of lands in socage by the statutes 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5: as we have seen, by 12 Car. II. c. 24, all the land in the kingdom, except copyhold, became socage; by the Statute of Frauds (29 Car. II. c. 3) (*i*), certain regulations in respect of the execution of a will were prescribed; and finally the Wills Act (1 Vict. c. 26) (*k*), consolidated and amended the law with respect to wills.

Formalities on execution. (1 Vict. c. 26, s. 9.)

By the Wills Act (*l*), it was required that the will should be signed at the foot or end thereof by the testator or other person under his direction, that such signature should be made or acknowledged by the testator in the presence of two (*m*) or more witnesses present at the same time, and that such witnesses should attest and subscribe the will in the presence of the testator. By the Wills Act Amendment Act, 1852 (*n*), it was explained what was intended by a signature at the foot or end of the will. In a recent case, the witnesses to the execution of a codicil signed their names on the back of the will, to which that codicil was attached by a pin, instead of attesting the signature of the testatrix on the paper itself. Sir James Hannen said:—

"The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyer's mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil. That codicil, being duly executed, confirms the will in its altered state, and probate will go accordingly" (*o*).

Witnesses. (1 Vict. c. 26, ss. 14—17.)

It was formerly considered that a witness who, or whose wife or husband, was to take an interest under the will, was not a credible witness, and therefore attestation by such would not do.

(*i*) S. 5.

(*k*) Amended by 15 & 16 Vict. c. 24.

(*l*) 1 Vict. c. 26, s. 9.

(*m*) Under the Statute of Frauds, three or four were requisite.

(*n*) 15 & 16 Vict. c. 24.

(*o*) *In the Goods of Braddock*, L. R. 1 Prob. D. 433. As to the case where the instrument actually executed by the testator comprised his will, but through fraud or inadvertence, contains something which is not his will, see *Rhodes* v. *Rhodes*, L. R. 7 App. Ca. 198; and *Morrell* v. *Morrell*, L. R. 7 P. D. 68.

The Statute of Frauds (*p*) required attestation by credible witnesses. The statute 25 Geo. II. c. 6 validated the attestation when there was a devise to the attesting witness, but invalidated the devise (*q*). The Wills Act extended the provisions of 25 Geo. II. c. 6 to the wives and husbands of attesting witnesses (*r*); but the marriage, after attestation, of a devisee to the attesting witness does not affect the validity of the devise (*s*).

A creditor, or the wife or husband of any creditor, although there be a charge of debts by the will in favor of such creditor, may be an attesting witness without the will being invalidated (*t*). Also an executor is not incompetent to prove the execution of a will, or its validity or invalidity (*u*).

Further, a will is not to be invalid by reason of an attesting witness being, at the time of execution or afterwards, incompetent to be admitted as witness to prove the execution (*x*).

What may be devised. (Ss. 3, 24.)

Under the Wills Act (*y*) all the real estate of the testator which he shall be entitled to at law or in equity at the time of his death, and which, if left to be disposed of by law, would descend to the heir, may be disposed of by his will, including estates *pur autre vie*, contingent interests, and rights of entry for conditions broken and other rights of entry; and notwithstanding he may become entitled to the same subsequently to the execution of his will. And the will is to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will (*z*).

Who may devise. (Ss. 7, 8.)

No person under the age of twenty-one years can make a will (*a*); and the will of an infant does not become operative by his subsequently attaining his majority; nor can the enactment be evaded by creating an express power to appoint during infancy (*b*). No power to make a will is given to a married woman, but it is expressed that no will made by one shall be valid, except such as might have been made by one before the Act (*c*). The Wills Act makes no reference otherwise to the competency

(*p*) 29 Car. II. c. 3, s. 5.
(*q*) See *Emanuel* v. *Constable*, 3 Russ. 436.
(*r*) 1 Vict. c. 26, s. 15.
(*s*) *Thorpe* v. *Bestwick*, L. R. 6 Q. B. D. 311.
(*t*) S. 16.
(*u*) S. 17.
(*x*) S. 14.
(*y*) S. 3. As to the execution of a general power of appointment by will, see *ante*, pp. 310, 312; and p. 171.
(*z*) See *In re Russell*, L. R. 19 Ch. D. 432.
(*a*) S. 7.
(*b*) Hayes & J. 8, note, and 67.
(*c*) S. 8.

Chap. XII.

of a testator, and the law remains the same, that persons not of a sound disposing mind, whether from idiotcy, insanity, or other cause, are incompetent to make a will (*d*).

Married women. (Ss. 8, 24, 25.)

Real estate may be so settled on a married woman as to dispense with the disqualification of coverture; it may be to her separate use (*dd*), or to such uses as, notwithstanding coverture, she may by will appoint; in such cases her devise of real estate, since as before the Act, has been in the exercise of a trust or power created for the purpose, and not under power given to her by the Act. Though no extension was given to her testamentary power by the Act, some extended effect and operation was given to her testamentary appointment—namely, by the 24th and 25th sections. By s. 24, the will is to take effect as if it had been executed immediately before the testator's death, unless a contrary intention appear from the will, and by s. 27 it is enacted that a general devise shall be construed to include any real estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of the power unless a contrary intention appear (*e*). The effect of these sections in the execution by will of a married woman may be seen in the following case (*f*):—

There was under the will of Sarah Davies a power of appointment by will to the survivor of Margaretta and David; Margaretta, while under coverture and during the life of David, made her will. She survived David, but did not republish her will.

Lord Westbury, L.C., in giving judgment (*g*), said:—

"It was objected that the statute cannot be applied to render valid any devise contained in the will of a married woman, which would not have been valid before the Wills Act. But the will of Margaretta Nicholl, if made before the statute, would not have been valid, as an appointment of the estate in question; therefore, say the appellants, the Court cannot apply to the will the beneficial principles and rules of construction which are introduced by the 24th and 27th sections of the Act, and which are necessary to render the will a valid appointment. In other words, the plaintiffs contend that the application to this will of the 24th section of the statute, thereby giving a subsequent date to the will, is to confer a testamentary capacity which would not otherwise exist, and that this is

(*d*) Hayes & J. 68 *et seq.*; and see *Smith* v. *Tebbitt*, 1 L. R. Prob. & Div. 398.

(*dd*) *Ante*, p. 114.

(*e*) *Ante*, p. 310.

(*f*) *Thomas* v. *Jones*, 11 W. R. 244.

(*g*) The L.C. went so fully into the question of the testamentary capacity of a married woman, and the effect thereon of the Wills Act, that it is here given *in extenso*.

forbidden by the 8th section; they insist that if by applying the statute you make the will of a *feme covert* include that which, but for the statute, it would not, you enlarge her capacity, and make her will valid as to property of which, without the statute, it would not be a valid disposition. It is obvious that the result of this reasoning would exclude all wills of married women from the benefit of the provisions of the Act, wherever, by virtue of its enactment, such wills would receive a more extended operation. Such could hardly have been the intention of the Legislature. We may perhaps ascertain the meaning of the 8th section by adverting to the state of the law at the time of the introduction of the Act, and observing the manner in which the Act is construed. By the law, as it stood at the time when the Act was passed, an infant might make a valid will of personal estate, but a married woman had no testamentary capacity except by virtue of a delegated authority. By means of a power or under a trust, as in the case of separate estate, a married woman might, by writing in the nature of a will, dispose of real or personal estate, and with the licence and consent of her husband she might make a will, properly so called, of personal property. It was the intention of the Legislature by the new statute to render infants absolutely incapable of making a will, but it has, I think, preserved the testamentary status of married women exactly as it stood under the existing law. Therefore, the married woman's devise of real estate must still be made by means of a trust or power created for the purpose, and her capacity to bequeath personal estate must still be derived from the licence and authority of her husband. A distinction exists between the testamentary power of a *feme covert* and the effect and operation of her testamentary appointment. No greater testamentary power is to be obtained from the Act than would otherwise have existed. But an effect and operation may be given under the statute to a testamentary instrument executed by a married woman, which may make that instrument a valid exercise of an existing testamentary power, which before the statute it would not have been held to be. But to render the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the statute, it is still necessary that Margaretta should have had at the time of her decease full power and right to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will by being made to speak at the time of her death still depends for its operation on the extent of her then existing testamentary authority. It seems to me, therefore, that the meaning of the 8th section may be correctly given by this paraphrase—no married woman shall acquire under this statute any greater testamentary right or power than married women are now capable of possessing by the existing law. In short, the legal testamentary status of a *feme covert* is to remain the same. And this is confirmed by observing the manner of the construction of the Act. First, the word 'will' is made to include appointments by will, or by writing in the nature of a will, in exercise of a power. And next, the third section is so worded as to give the most extensive testamentary power to every person, which word would include infants and married women, and render them as competent as any other persons but for the effect of the 7th and 8th sections. By the 7th section the infant is absolutely disqualified, and by the 8th section the legal position of the *feme covert* is made to remain

Chap. XII.

as before. Personally, she acquires no enlarged capacity from the statute, although her testamentary instrument or will, when made, may have the benefit of more liberal rules of interpretation. But the appointment and the will are still to be confined within the limits of the authority of the maker, existing at the time of the death. It is not, however, necessary that the authority should exist at the time of the execution of the instrument if it be afterwards acquired, and be subsisting at the time of the death of the testatrix. Such appears to me to be the meaning of the language of the Act, and to have been the intention and policy of the law. I have no difficulty in holding that by virtue of the 24th section the will of Margaretta is to be read and applied as if it had been executed immediately before her decease, and that under the 27th section the general devise contained in the will so being held to have been re-executed is a good execution of the power of appointment given to the survivor."

Now, by the Married Women's Property Act, 1882 (*gg*), it is enacted that a married woman shall, in accordance with the provisions of that Act, be capable of (*inter alia*) disposing by will of any real or personal property as her separate property, in the same manner as if she were a *feme sole*; and that every woman married after 1882 shall be entitled to dispose of in manner aforesaid all property which shall belong to her at marriage, or shall be acquired by or devolve upon her after marriage; and that every woman married before 1st January, 1883, shall be entitled to dispose of in manner aforesaid as her separate property all property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after 1882. This power of disposition of a married woman is, however, subject to the provisions of any settlement made before or after marriage.

Devise to a corporation.

Under the Statutes of Wills (*h*) a devise of lands to a corporation was void, but those statutes were repealed by the Wills Act, and nothing is said therein as to bodies corporate, so now there is no invalidity in a devise to a corporation as being a devise, but its validity must depend on the capacity of the corporation to take the benefit of it (*i*).

II. Lapse.

With two exceptions made by the statute, in every case of testamentary disposition the law implies the condition that the devisee shall survive the testator, or the gift in his favor will fail, or, as it is termed, 'lapse.' The exceptions are to be found

Two exceptions. (Ss. 32, 33.)

(*gg*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, and 19.

(*h*) 32 Hen. VIII. c. 1; and 34 & 35 Hen. VIII. c. 5, s. 5.

(*i*) See *ante*, pp. 90 *et seq.*

in the 32nd and 33rd sections of the Act. They apply respectively to the case of a person to whom real estate has been devised for an estate tail, or in *quasi*-entail, having died in the lifetime of the testator, leaving issue, who would be inheritable, living at the testator's death; and of a person being a child or other issue of the testator, to whom an estate has been devised not determinable at or before his or her death, dying in the lifetime of the testator leaving issue living at the testator's death: unless, in either case, a contrary intention appear by the will.

Two cases have recently occurred illustrating the effect of the 33rd section. In the one (*k*) a testator devised a freehold estate to his daughter for her separate use in fee; but she had died in his lifetime leaving one child living at his death. It was held by Jessel, M.R., that it was to be taken as if the daughter had died immediately after her father, and, therefore, for a moment had seisin in law, yet as during that moment her husband could not have obtained seisin in fact, and *impotentia excusat legem*, he was entitled for his life as tenant by the curtesy. In the other case (*l*), a testator devised a freehold house to his son, and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime, leaving issue living at his father's death, but having devised all his real estate to his father. It was held by Hall, V.C., that the object and purpose of the section was to effectuate the will of the father, and therefore the son took the estate, and that the gift by the son failed, and therefore he died intestate as to his real estate including that property, which went to his eldest son as his heir.

Lapse is not prevented by the land being given to the devisee, "and his heirs," which are but words of limitation. It should be observed that neither section substitutes for the deceased intended taker, his or her issue, but makes the subject of the devise the absolute property of the intended taker, and as such comprised within the disposition of his will, notwithstanding he died before the testator, or descendible to his heir-at-law. The 33rd section does not apply to gifts to classes (*m*); nor does it apply to gifts under a special power of appointment, as a power to appoint to children only, so as to prevent a lapse upon the death of an

(*k*) *Eager* v. *Furnivall*, L. R. 17 Ch. D. 115.

(*l*) *In re Hensler, deceased*, L. R. 19 Ch. D. 612.

(*m*) Hayes & Jarman, 59; and 4 Da. 42, 4th ed.

Chap. XII.

appointee, where there is a gift over in default of appointment. In such case the property goes over to the specified objects, not by virtue of the intention of the donee of the power, who has no control over the property, but by virtue of the previous directions of the donor (*n*). But it does apply to gifts under a general power of appointment, although there is a gift in default of appointment. In such case, the power comes within the 27th section of the Act, which was intended to sweep into a general devise or bequest all property over which the testator had a general power of appointment (*o*).

Residuary devise. (S. 25.)

Lapsed devises, unless there be a residuary devise, will go to the heir-at-law. If there be a residuary devise it is now enacted (assimilating a residuary devise of real estate to a like bequest of personalty)—

> S. 25. "That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

Will speaks from death. (S. 24.)

By the Wills Act, a will is made to speak from the death of the testator, unless a contrary intention appear in it (*p*). It is enacted—

> S. 24. "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Residuary devise still specific.

Before the Act, the will speaking from its date, a residuary devise of real estate was held to be specific, and therefore where the personal estate of a testator was insufficient for the payment of his debts, the specific devisees, including the residuary devisee, had to contribute rateably to make good the deficiency. The question arose whether the Wills Act had made any difference in the law in this respect, and it was decided that it had not, for the reasons thus expressed by Lord Cairns, L.C. (*q*):—

(*n*) See *per* Shadwell, V.C., in *Griffiths* v. *Gale*, 12 Sim. 359.

(*o*) See *per* Wood, V.C., in *Eccles* v. *Cheyne*, 2 H. & J. 680; and Tudor's L. Ca. on Real Prop. 916, notes to *Elliot* v. *Davenport*.

(*p*) See *In re Russell*, L. R. 19 Ch. D. 432.

(*q*) *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 140.

"Before the Wills Act the rule of law was as well settled as any rule of the Court, that a residuary devise of real estate was treated as specific, and although the items were not specified, it was considered quite as much specific as if they had been specified. The result of this general rule of law was, that after-acquired real estate would not pass under a general devise. Then the Wills Act stepped in. It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the Act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil intended to be cured, and dealing with it separately by particular enactments. The Legislature had to deal with the question of a will passing after-acquired property, and it has dealt with it by the 24th section. The effect of that is, as Lord Westbury on one occasion expressed it, that the Legislature attributed to the will a continuing operation as if the devise were repeated every moment until the testator's death; so that as to all the property it must be taken as if he made it the moment before his death. If we realise this hypothesis of the Legislature, the result is that this residuary devise must be taken as having been made the moment before the testator's death, but as a devise specific in its nature. There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made—namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises."

Marshalling assets.

The rule in regard to 'marshalling assets,' as it is called, further is, that where the residuary personal estate is insufficient to pay the debts or pecuniary legacies, the deficiency must be made good by the pecuniary legatees in priority to the specific (including the residuary) devisees (*r*).

Revocation. (Ss. 18, 19, 20 and 23.)

All testamentary disposition is liable during the lifetime of the testator to his revocation (*rr*). Apart from the operation of a codicil, this may be effected by any of the following means—namely, by another will or codicil, where the earlier and later are inconsistent (*s*), or by some writing declaring an intention to revoke the same, and executed in the manner required for the execution of a will, or by the burning, tearing, or other destruction of the document by the testator, or other person in his presence, and by his direction, with the intention of revocation (*t*), or by the marriage of the party (without the additional circumstance of the birth of a child formerly requisite) (*u*), except where the will is in

(*r*) *Tomkins* v. *Colthurst*, L. R. 1 Ch. D. 626; and *Farquharson* v. *Floyer*, L. R. 3 Ch. D. 109.

(*rr*) See recent case on the effect of a covenant not to revoke, *Robinson* v. *Ommanney*, W. N. (1883), p. 57.

(*s*) Hayes & Jarman, 32.

(*t*) 1 Vict. c. 26, s. 20.

(*u*) Hayes & Jarman, 84.

Chap. XII.

exercise of a power of appointment, and the estate in default of such appointment would not pass to the heir of such party (*x*).

Recently the following case arose illustrative of when a will is not to be considered 'otherwise destroyed' within section 20, so as to be revoked (*z*):—

The will and codicils were, at the testator's death, found upon the kitchen table. The testator had drawn a pen through the lines of some part of the will, leaving the words perfectly legible, and had written on the back, "all these are revoked." A housekeeper, who had been nine years with the testator, and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three, but that he had cancelled them, and they were good for nothing, and that the testator had in her presence taken up this will and thrown it among a heap of waste paper on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting-room, under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting-room among a quantity of other papers, and that she took it out of the sitting-room, where it was lying by the coal-box, along with other scraps of paper, and took it into the kitchen, where she put it on the table. Then it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again. The Judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal.

The judgment on appeal was delivered by James, L.J., who said:—

"We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the Court below, "All the destroying in the world without intention would not revoke a will, nor all the intention in the world without destroying: there must be the two.""

Loss or destruction.

If a will be lost or destroyed without the intention of revoking it, and the substance thereof can be ascertained by means of the original instructions, or by a copy of the will, or by the recollection of persons who heard it read over, probate will be granted of a paper embodying such substance (*a*). It will be remembered that the will of Lord St. Leonards was not forthcoming, though eight codicils to it were; there being no evidence of an intention to revoke the will, the Court, mainly on the evidence

(*x*) 1 Vict. c. 26, s. 18.

(*z*) *Cheese* v. *Lovejoy*, L. R. 2 Pr. D. 251.

(*a*) Hayes & Jarman, 36.

and recollection of the testator's daughter, Miss Sugden, pronounced for—

"The force and validity of the last will and testament of the Right Hon. Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, bearing date on or about the 13th January, 1870, and for the contents thereof as in substance or in effect set forth in the third paragraph, as amended, of the declaration filed in this cause on behalf of the plaintiffs, and also for the force and validity of the eight codicils to the said will" (*b*).

Obliteration—interlineation—alteration. (S. 21.)

No obliteration, interlineation, or other alteration, subsequent to the execution of the will, will have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, or unless such alteration be authenticated by the like ceremonies as the will itself (*c*). And contrary to the case of a deed (for a deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud and wrong), it will generally be presumed that an alteration appearing on the face of a will was made after execution (*d*). But alterations made prior to execution will be read as part of the will, if identified in any way provided by the 21st section.

Revival. (S.22.)

No will, or any codicil, or any part thereof, once revoked, can be revived otherwise than by re-execution, or by a codicil showing an intention to revive the same (*e*). And it is further provided by the same section that:—

> "When any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

A curious instance of the application of this section recently came before the Court of Probate. A testator made a will, and afterwards another, which, by implication, revoked the former will. Subsequently, by the terms of a duly executed codicil, he by mistake referred to the former instead of the later will. It was held that the codicil revived the former will, and that as it did not revoke the later will, all three documents must be admitted to probate (*f*).

(*b*) See the case of *Sugden* v. *Lord St. Leonards*, L. R. 1 Pr. D. 207.

(*c*) S. 21.

(*d*) See Hayes & Jarman, 37.

(*e*) S. 22.

(*f*) *In the Goods of Stedman*, and *In the Goods of Dyke*, L. R. 6 P. D. 205.

Chap. XII.

Revocation by alteration of estate (s. 19); or by alienation of part. (S. 23.)

Revocation by presumption of an intention to revoke from alteration in circumstances is abolished, or by subsequent conveyance of any portion of the property or other act in regard to it (*g*).

III. Executors.

As regards real estate, a will is complete without the appointment of an Executor. The property vests directly in the devisee by the operation of the devise. When beneficial interests are created apart from legal ownership, it is not by the constitution of the executor that this is effected, but by the appointment of trustees, to whom ordinarily the property is devised for the purpose. Most persons, however, who have realty to devise have likewise some personalty to bequeath, and, as a general practice, it is usual to comprehend in every will the appointment of an executor.

Charge of debts and legacies.

A question, however, arose whether, where the testator had appointed executors, and also had charged his real estate with payment of his debts, there was not thereby given to them by implication a power of sale to satisfy the debts, or whether the only remedy of the creditors was by application to the Court of Chancery for the administration of the estate (*gg*). In consequence, the following provisions were enacted in Lord St. Leonards' Act to further Amend the Law of Property (*h*) :—

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

S. 14. "Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid, by a sale, and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper (*i*).

(*g*) 1 Vict. c. 26, s. 23.

(*gg*) See Hayes & Jarman, 562 *et seq.* As to the order of liability to the payment of debts as between the different parts of the estate (personal and real), see notes to *Silk* v. *Prime*, Tudor's L. Ca. in Eq. (4th ed.), vol. ii. 137.

(*h*) 22 & 23 Vict. c. 35.

(*i*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 35 and 36.

Powers given by last section extended to survivors, devisees, &c.

S. 15. "The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall, for the time being, be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid (*k*).

Executors to have power of raising money, &c., where there is no sufficient devise.

S. 16. "If any testator, who shall have created such a charge as is described in the 14th section, shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Purchasers, &c., not bound to inquire as to powers.

S. 17. "Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections 14, 15, and 16, of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof (*l*).

Sections 14, 15 and 16, not to affect certain sales, &c., nor to extend to devises in fee or in tail.

S. 18. "The provisions contained in sections 14, 15, and 16, shall not in any way prejudice or affect any sale or mortgage already made, or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and th said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do."

In explanation of the effect of the above enactments, reference may be made to a recent case (*m*), in which a testator directed that his debts should be paid by his executors, and in case his personal estate should be insufficient for that purpose, then he charged his real estate with the payment of the deficiency. Both executors renounced probate, and letters of administration with the will annexed were granted. It was held that the statute gave the administrator no power to sell the real estate.

(*k*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 38.

(*l*) See, as to duty of purchaser, where executors in whom the fee is vested by the will are selling real estate charged with debts, *In re Tanqueray, Willaume & Landau*, L. R. 20 Ch. D. 465.

(*m*) *In re Clay* v. *Tetley*, L. R. 16 Ch. D. 3.

Chap. XII.

As to the effect of the above enactment, it has been observed (*n*), that—

"The difficulty has been removed in two cases: 1st, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts; and 2ndly, by giving the executor a power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee. But in the cases where the testator died before the 13th August, 1859 (*o*), or where there is a devise, subject to the charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves the question in the same doubt and perplexity as before."

Implied charge of debts.

Questions have arisen whether a general direction for payment of debts has created a charge on the real estate (*p*). Sir John Leach, M.R., laid it down (*q*), that where a testator directed his just debts and funeral expenses to be paid by his executor thereinafter named, to whom after certain other legacies and an annuity, he gave his whole estate real and personal; the obligation to pay was a condition imposed on him, to be satisfied as far as all the property, which he derived under the will, would extend whether personal or real. Again, Sir Richard Arden, M.R. (*r*), said, a mere direction to the executors to pay the debts, without giving them any other fund than the personal estate out of which they can fulfil their duty, does not amount to a charge upon the real estate.

Implied charge of legacies.

Similar questions have arisen in regard to charges for the payment of legacies. The well-established rule, having, as Jessel, M.R., said, in a recent case (*s*), been acted on by the Court of Chancery for 200 years, and having been confirmed by a decision of the House of Lords (*t*), is that, if you give legacies generally, and then give the residue of the real and personal estate in one mass, that charges the legacies on the residuary real estate; and he held that it made no difference as to its being charged, that the testator directed that the legacies should be paid by the executors, who were not the trustees of the will to whom the residue was given. Said Lord Campbell, L.C.:—

(*n*) Hayes & Jarman, 568.

(*o*) The date of the passing of the Act; 22 & 23 Vict. c. 35, s. 14.

(*p*) See the cases collected in 2 Prid. 409.

(*q*) In *Henvell* v. *Whitaker*, 3 Russ. 343.

(*r*) In *Keeling* v. *Brown*, 5 Ves. 360*a*.

(*s*) *In re Brooke*, L. R. 3 Ch. D. 632; and see *Bray* v. *Stevens*, L. R. 12 Ch. D. 162.

(*t*) In *Greville* v. *Browne*, 7 H. L. C. 689.

"It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given *minus* what has been before given, and therefore given subject to the prior gift" (*u*).

How to frame will to prevent these questions.

To prevent questions and difficulties arising, it is then advisable in framing a will, if the testator desires to charge the debts or legacies on his real estate, that he should do so expressly, and provide the requisite machinery for effectuating his intention (*x*), leaving the Act to operate, where applicable, only to cases where such provision has been omitted (*y*). Mr. Davidson omits from his Forms the common direction in general terms for payment of funeral and testamentary expenses and debts (*z*). He says:—

"The testator is sometimes made to direct in general terms the payment of his funeral and testamentary expenses and debts, but this is incorrect. If he mean nothing more than that they should be paid out of his personal estate, there is no occasion to direct this to be done; because it must be done by law whether he will it or not; if, on the other hand, he desires to charge his funeral and testamentary expenses and debts on some particular fund, or on his real estate, he should do so expressly, and provide the requisite machinery for effecting the intention" (*a*).

It will be remembered (*b*), that by the common law the lands of the deceased were not liable to his debts, except where they had descended to the heir, and then only in respect of debts due on bonds, covenants, or other specialties, by which the deceased had bound himself and his heirs (*c*). In such cases the heir was bound so far as he had lands descended to him sufficient to answer the debt of his ancestor. But creditors by specialties which affect the heir, had not, at common law, the same remedy against the devisee of their debtor, until it was given by statute 3 Wm. & Mary, c. 14. In other cases, unless the deceased had by his will charged his lands with payment of his debts, which charge was effective in equity, the lands remained free, until 47 Geo. III.

(*u*) 7 H. of L. C. 697.

(*x*) 4 Da. 3; and 2 Prid. 413.

(*y*) See further as to the law before and after passing above statute, 2 Da. ii. 469 *et seq.*

(*z*) Vol. iv. p. 3. 4 Vol. ii. pp. 472.

(*a*) Several forms will be found in Da. vol. iv.; see in particular, p. 222: and at p. 451 of the Concise Precedents the ordinary provision for payment out of the monies produced by the sale and conversion of the real and personal estate as a whole.

(*b*) *Ante*, p. 110.

(*c*) 2 Wms. on Exors. Pt. iv. bk. i. c. 2.

Chap. XII.

c. 74 rendered the lands of traders available in such cases, and eventually 3 & 4 Wm. IV. c. 104 made the lands, not by his will charged with or devised subject to the payment of the testator's debts, assets to be administered in the Courts of Equity for the payment of all debts, whether on simple contract or on specialty (*d*). And this remains the remedy where there is no express or implied charge of debts in the will.

Probate.

Before the Probate Act, 1857 (*e*), the validity of a will of real estate was tried only in the Courts of law, and probate was no evidence of the validity or contents of a will as to realty; and, if a will related exclusively to realty, it was not entitled to probate in the spiritual Courts, nor is such a will entitled to probate in the Probate Court under the Act (*f*). Prior to the Act spiritual (or ecclesiastical) Courts had jurisdiction in respect of wills of personalty, and the Probate Act was passed because it was expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration should be exercised by one Court. That Act contains the following provisions both as respects proof of a will where it affects real estate and the effect of probate.

Where a Will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

S. 61. "Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next-of-kin, or others having or pretending interest in the personal estate affected by a will, should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders and to the discretion of the Court.

Where the will is proved in solemn form or its validity otherwise decided on, the decree of

S. 62. "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate decree or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the

(*d*) *Semble:* The executor's right to retain a debt due to him out of the testator's estate can never exist with regard to the real estate, which is made assets by this statute: *per* Fry, J., *Walters* v. *Walters*, L. R. 18 Ch. D. 186.

(*e*) 20 & 21 Vict. c. 77.

(*f*) Hayes & Jarman, 548.

the Court to be binding on the persons interested in the real estate.

letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall, in all Courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate save in any proceeding by way of appeal from such decrees or orders.

Heir, in certain cases, not to be cited, and where not cited not to be affected by probate.

S. 63. "Nothing herein contained shall make it necessary to cite the heir-at-law, or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the Court, and the Court is satisfied that the deceased was at the time of his decease seised of, or entitled to, or had power to appoint by will, some real estate beneficially, or in any case where the will propounded, or of which the validity is in question, would not, in the opinion of the Court, though established as to personalty, affect real estate; but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in real estate; provided that the probate, decree, or order of the Court, shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

Probate or office copy to be evidence of the will in suits concerning real estate, save where the validity of the will is put in issue.

S. 64. "In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

Chap. XII.

The effect of s. 64 came into question in an action of ejectment by the heir against the defendant claiming as devisee under a will (*g*). Notice was given by the defendant of his intention to give in evidence, as proof of the devise, the probate of the will, and the plaintiff failed to give counter-notice that he disputed the validity of the devise, and therefore at the trial he was not allowed to dispute it; on appeal, however, it was held that he was entitled to contest the validity at the trial. Martin, B., in giving the judgment of the Court, said :—

"Now at the trial in the present case, the same effect was given to the probate in common form under this section, as would have been given to a probate after proof in solemn form under section 62, by which such probate is to be "received as conclusive evidence of the contents and validity of the will, in like manner as probate is received in evidence in matters relating to the personal estate;" whereas, in section 64 no such language is used; on the contrary, it seems to be purposely avoided. The language of section 64 is, that the probate shall be "sufficient evidence." This enactment has a very useful and extensive application. It is well known in practice that it is a most expensive proceeding to produce the original will, which is in general in the custody of the Court of Probate; that Court will not trust it out of the possession of one of their officers, and the officer has often to be kept several days at the assizes. Section 64 has a most useful bearing in tending to prevent this expense. Again, it had been always necessary to produce one of the attesting witnesses, as section 26 of the Common Law Procedure Act, 1854 (*h*), only applies to cases where attestation is unnecessary; and this provision of section 64 appears to dispense with the necessity of calling either of the attesting witnesses, for the probate is to be sufficient evidence of the will, and of its validity and contents. But there is nothing in this section to lead to the conclusion that after notice the opposite party is not to be admitted to show that the testator was incapable, and the will invalid. To hold that the omission to give the counter-notice of an intention to dispute the validity of the will would have the effect of establishing a will, even if made by a lunatic in an asylum, would be carrying the language used far beyond its true meaning. The true meaning appears to be, when a notice has been given of the intention to use the probate in evidence, and the other side do not give a counter-notice within four days, the probate without more will be admissible evidence of the will and its contents as to realty, and will be *primâ facie* evidence of the validity of the will and the competence of the testator; in other words, the probate alone will be sufficient evidence to go to the jury of a devise of realty; but there is nothing to prevent the other side from showing by evidence that the will is not valid, or that the testator was not competent."

By the Judicature Act, 1873 (*i*), all causes and matters within

(*g*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

(*h*) 17 & 18 Vict. c. 125.

(*i*) 36 & 37 Vict. c. 66, s. 34.

the exclusive cognisance of the Court of Probate were assigned to the Probate, Divorce, and Admiralty Division of the High Court.

General devise of lands. (S. 26.)

In speaking of lands and real estate, we have been referring to freehold estates only; but by s. 26 of the Wills Act (*k*), it is provided that a general devise of lands, whether there be freeholds or not, will include customary, copyhold, or leasehold estates, unless a contrary intention appear by the will. Before the Act they only passed where there were no freeholds to satisfy the devise (*l*).

Trust and mortgage estates.

In addition to his own estates of inheritance vested in a man at his death, are often others vested in him as trustee or mortgagee. Question arose as to the operation of a general devise on these. The principle was laid down by Lord Eldon (*m*), and has not been since doubted, that, where a mortgagee or trustee makes a general devise of real estate, the mortgage and trust estates will pass thereby, "unless it is to be collected from expressions in the will, or the purposes or objects of the testator, that he did not mean they should pass."

A general devise, says Mr. Tudor (*n*), will not pass a trust estate, or a mortgaged estate vested in a trustee, if any intent appears to treat the property comprised therein in a manner inconsistent with the nature of trust property. Thus, where a testator, having made a general devise, charges the property comprised in it with debts, legacies, annuities, or otherwise, the legal estate of property vested in the testator as trustee or as mortgagee upon trust for others, even when he is partly interested in the equity of redemption himself, and partly as trustee, will not pass under such general devise.

Now, however, as we have seen (*o*), by the Conveyancing and Law of Property Act, 1881 (*p*), any estate or interest vested on any trust or by way of mortgage in any person solely, shall on his death, after 1881, notwithstanding any testamentary disposition, devolve to and vest in his personal representatives in the same manner as if it were a chattel real.

(*k*) 1 Vict. c. 26.

(*l*) See *ante*, p. 138.

(*m*) 1803, in *Lord Braybroke* v. *Inskip*, Tudor's L. Ca. on Real Prop. 990.

(*n*) P. 993, quoting the authorities; and see *In re Bellis's Trusts*, L. R. 5 Ch. D. 504; *Osborne* to *Rowlett*, L. R. 13 Ch. D. 774; and *In re Morton and Hallett*, L. R. 15 Ch. D. 143.

(*o*) *Ante*, pp. 199, 268.

(*p*) 44 & 45 Vict. c. 41, s. 30.

Chap. XII.

Execution of trust by devisee.

The further question arose, how far the devise of a trust estate would do more than pass the legal estate, in other words, how far the devisee could execute the trust; and it was held to depend on the intention of the settlor, to be collected from the terms in which the instrument was expressed (*q*). The question turned on whether a personal confidence was reposed in the persons named, and most frequently occurred in questions of power to sell.

But these questions in the case of persons dying after 1881, are also prevented by the Conveyancing and Law of Property Act, 1881 (*r*), which, in continuation of the above enactment, gives the like powers to the deceased's personal representatives to dispose of and deal with the trust and mortgage estates as if the same were a chattel real, with all the like incidents, but subject to all the like rights, equities, and obligations; and for such purposes the deceased's personal representatives are to be deemed his heirs and assigns within the meaning of all trusts and powers.

In connection with this, reference should be made to the provision by the same Act (*s*), as to executorships and trusts constituted after or created by instruments coming into operation after 1881—that where a power or trust is given to or vested in two or more executors or trustees jointly, it may be exercised or performed by the survivor or survivors for the time being, unless a contrary intention has been expressed in the instrument; thereby removing the difficulty as to whether the surviving executor can sell under a devise to executors to sell (*t*).

Estate of trustees. (1 Vict. c. 26, ss. 30, 31.)

In devises to trustees, the question often arose whether, no particular estate having been limited to them, they took the fee, or a less estate; and, if the fee, whether it was determinable or not when the trusts were satisfied. In certain cases, it was adjudged that trustees, whose estate was undefined, took a term of years (either with or without a prior estate for life) determinable when the purposes of the trust should be satisfied (*u*). To exclude the application of this inconvenient and very refined rule of construction, two enactments were introduced into the Wills Act (*x*), namely:—

(*q*) Lewin on Trusts, 211; and *In re Burtt*, 1 Drew. 319.

(*r*) 44 & 45 Vict. c. 41, s. 30; and 1 Wms. on Exors. Pt. ii. bk. ii. c. 1.

(*s*) S. 38.

(*t*) Note to s. 38 by Wol. & T.

(*u*) See Jarman on Wills, vol. ii. 320.

(*x*) 1 Vict. c. 26.

No devise to trustees or executors except for a term or a presentation to a church, shall pass a chattel interest.

S. 30. "That where any real estate (other than or not being a presentation to a Church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise where the trust may endure beyond the life of a person beneficially entitled for life to take the fee.

S. 31. "That where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

These clauses have been the subject of much criticism. Mr. Jarman (*y*) says:—

"It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of section 30 would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a definite term of years, either expressly or by implication; but section 31 takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a Church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have some estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, an estate for years, or as in *Doe* v. *Simpson*, an estate for life, with a superadded term for years, but) an estate in fee simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee."

Again, Mr. Hawkins says (*yy*):—

"These sections have been described as obscure and even conflicting:

(*y*) Jarman on Wills, vol. ii. 320.

(*yy*) Hawkins' Constr. Wills, 156.

Chap. XII.

their meaning, however, will be apprehended by observing that the 30th section, which speaks of a devise passing, "the fee simple or other the whole estate or interest of the testator," relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees "the fee simple or other the whole legal estate" in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts, that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 31st section enacts, that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute legal estate in fee simple."

IV. Construction of Devises —words of limitation— failure of issue. (Ss. 28, 29.)

Perhaps, says Mr. Jarman (*z*), there was no one of the old rules of testamentary construction which so directly clashed with popular views as that which required words of limitation or some equivalent expression to pass the inheritance. And, again (*a*), few points of testamentary construction have come more frequently under discussion than the question whether words importing a failure of issue refer to issue indefinitely (*i.e.*, to a failure of issue at any time), or to a failure of issue at the death; which has arisen, in a great degree, from the discrepancy between the popular acceptation and the legal sense of the phrase, and the consequent willingness to admit grounds for departing from the technical doctrine—namely, that where the words are unexplained by the context, they import a general failure of issue at any period (*b*). Accordingly, the Wills Act (*c*), contained the following enactments in abolition of these technical doctrines.

Devise without words of limitation.

S. 28. "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

Words importing failure of issue to mean issue living at the death.

S. 29. "That in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of

(*z*) Jarman on Wills, vol. ii. 286.
(*a*) *Ib.* 497.
(*b*) See *Forth* v. *Chapman*, Tudor's L. Ca. on Real Prop. 682.
(*c*) 1 Vict. c. 26.

such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

The same writer (*d*) points out that—

"The effect of the 28th section is not wholly to preclude, with respect to wills made or republished since the year 1837, the question whether an estate in fee will pass without words of limitation, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, "unless a contrary intention shall appear by the will." The *onus probandi* (so to speak) will, under the new law, lie on those who contend for the restricted construction" (*e*).

And again (*f*)—

"The result of the new doctrine contained in the 29th section appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established:—First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity—*i.e.*, where the words may import either a failure of issue in the lifetime or at the death, or an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A. or to A. and his heirs, and if A. shall die and his issue shall fail at any time, then to B., A. will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine."

An example of the exception, in the 29th section, of a preceding gift being, "without any implication arising from such words, a limitation of an estate tail to such person," occurred in the following case—namely, "in trust for all and every my child or children in equal shares, and the several heirs of their respective bodies, and in case there shall be a failure of issue of any of such children, then as to the share or shares," &c. The testator left

(*d*) Jarman on Wills, vol. ii. 287.

(*e*) See as to gift of income of real property now passing the fee, *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*f*) Jarman on Wills, vol. ii. 533. See *ante*, p. 223.

Chap. XII.

two children; and the question was whether they took estates tail, or only estates for life with remainders to their children with cross-remainders over. It was held that, there being in such case a preceding gift of an estate tail, the Act did not apply, and the testator's children took estates tail (*g*).

(*g*) *Green* v. *Green*, 3 De G. & Sm. 480; see also *Dawson* v. *Small*, L. R. 9 Ch. App. 651.

CHAPTER XIII.

INCORPOREAL HEREDITAMENTS.

I. Incorporeal hereditaments —what.

REFERENCE was made in the Introduction to the division of hereditaments into Corporeal and Incorporeal. The following definition and explanation of the latter is given by Blackstone (*a*):—

"An Incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance which may be always seen, always handled: incorporeal hereditaments are but a sort of accident which inhere in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them. An annuity, for instance, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself which produces that money is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf, or tenth lamb, seem to be completely corporeal: yet they are indeed incorporeal hereditaments; for, they being merely a contingent right, collateral to or issuing out of lands, can never be the object of sense; they are neither capable of being shown to the eye nor of being delivered into bodily possession."

Classifications.

The term 'incorporeal hereditament' is also often applied so as to include reversions and remainders as distinct from estates in possession in corporeal hereditaments; in distinction the hereditaments of which we are about to treat are styled 'purely incorporeal' (*b*).

Blackstone does not attempt any scientific classification of

(*a*) Vol. ii. 20.

(*b*) Wms. 317.

Chap. XIII.

incorporeal hereditaments, but says, they are principally of ten sorts: 1, advowsons; 2, tithes; 3, commons; 4, ways; 5, offices; 6, dignities; 7, franchises; 8, corrodies or pensions; 9, annuities; and 10, rents (*c*).

Purely incorporeal hereditaments have been classified as of three kinds—namely, 1, such as are 'appendant' to corporeal hereditaments; 2, such as are 'appurtenant,' that is, are not naturally and originally appendant, but have been annexed to the corporeal hereditaments, either by some express deed of grant or by prescription from long enjoyment; and 3, such as are 'in gross,' or exist as separate and independent subjects of property (*d*).

Difference between 'appendant' and 'appurtenant.'

The difference between what is 'appendant' and what is 'appurtenant,' is explained in the first resolution in *Tyrringham's Case* (*e*) :—

"Prescription does not make a thing appendant, unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant; as a thing corporate cannot be appendant to a thing corporate, nor a thing incorporate to a thing incorporate. But a thing incorporate, as an advowson, may be to a thing corporate as to a manor, or a thing corporate, as land, to a thing incorporate as an office; but everything incorporate cannot be appendant to a thing corporate, as common of turbary cannot be appendant to land, but to a house, for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turfs are to be spent in a house. So, a leet (*ee*) cannot be appendant to a church or chapel, for they are of several natures."

The beginning of 'common appendant' by the ancient law is there given thus:—

"When a lord enfeoffed another of arable land, to hold of him in socage, *i.e.*, *per servicium socæ*, as every such tenure at the beginning was, that the feoffee *ad manutenendum servicium socæ*, should have common in the lord's wastes for his necessary cattle which ploughed and manured his land, and that for two reasons:—1st. Because it was, as it was then held, *tacitè* implied in the feoffment; for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, *et per consequens* the feoffee should have (as a thing necessary and incident), common in the lord's wastes and land, and that appears

(*c*) 2 Bl. 21. 'Corrodies' and 'pensions' were both, at the common law, species of allowances in money or food, payable by religious houses to the king, their founder, for the sustenance of his servants (*ib.* 40). A 'franchise' is a royal privilege subsisting in the hands of a subject, *e.g.*, to have a market, a forest, a fishery, &c. (*ib.* 37); it applies mostly, if not wholly, to manors.

(*d*) See Wms. on Real Prop. pp. 317, 323.

(*e*) Tudor's L. Ca. on Real Prop. 122.

(*ee*) *i.e.*, court of a hundred or manor.

by the ancient books, and by the rehearsal of the Statute of Merton, c. 4. The second reason was for the maintenance and advancement of tillage, which is much respected and favored in law, so that such common appendant is of common right, and commences by operation of law, and in favor of tillage, and therefore it is not necessary to prescribe therein, as it would be if it was against common right; but it is only appendant to ancient land, arable, hide, and gain, and only for cattle, *&c.*, horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and therefore it is against the nature of a common appendant to be appendant to meadow or pasture" (*f*).

On the other hand, such rights as do not arise out of any natural necessity or propriety, and are not therefore of general right, but have been annexed to the corporeal hereditament, are 'appurtenant' (*g*). This common of pasture appurtenant does not, like common appendant, owe its origin to common right, or to a general privilege supposed to have been conferred by lords of manors upon tenants to whom they granted arable land; but it may commence at the present day, and may be claimed from the grant of the owner of the land, or by prescription, which supposes a now forgotten grant (*h*).

II. Tithes and advowsons.

First, as to Tithes and Advowsons. England has what is called a State religion—that is, a particular form of worship throughout the country, upheld and protected by the law; hence the term 'the Established Church.' Tithes constituted the provision, or a portion of the provision, for the ministers of this Church, being a fund for their maintenance generally issuing out of land, and amounting to a tenth part of the yearly increase of the soil. Originally, every one was at liberty to contribute his tithes to whatever church or priest he liked. The whole soil of the country, however, becoming divided into certain ecclesiastical districts called parishes, the tithes of each parish became dedicated to the support of the church of the parish out of which they issued, and were payable accordingly to the incumbent. Under recent Acts (*i*) of Parliament a rent-charge, varying with the price of corn, has now been substituted for tithes in kind.

(*f*) Tudor's L. Ca. on Real Prop. 122.

(*g*) 2 Bl. 33.

(*h*) *Tyrringham's Case*, Tudor's L. Ca. 130.

(*i*) The Tithe Commutation Act, 6 & 7 Wm. IV. c. 71, amended by 7 Wm. IV. & 1 Vict. c. 69, 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93; 31 & 32 Vict. c. 89; and lastly 41 & 42 Vict. c. 42 (which principally relates to the redemption of tithe rent-charge); see 2 Da. i. 627.

Chap. XIII.

To every parish now is attached a church in which the State worship is solemnised, though there be other places of religious worship. The origin of these churches is, for the most part, their erection at an early date by the then lord of the manor, and his endowment of it (beyond the tithes) with a Glebe or grant of land for the maintenance of the priest, and on which a house was built for his residence, with probably accompanying pasture or garden land for the keep of his cattle and more immediate supply of himself and his family. This establishment of the Church and its endowment gave the right for all time to come of nominating the minister to officiate in the Church, which right was called an 'advowson.'

From the dissolution of monasteries it has arisen that not only the lands of many laymen (being derived from the Crown) are discharged from tithes; but that subsisting rights of tithe and the property of entire rectories are vested in lay hands. In all the Acts of Hen. VIII., by which the possessions of religious houses were given to the Crown, parsonages or churches and tithes were expressly included; and royal grants were subsequently made, either of a rectory or parsonage, which comprised the parish church with all its rights, glebes, tithes, and other profits, or else of the tithes of a particular tract of land (*ii*).

So long as matters remained in their original state—that is, so long as there was no severance of the advowson from its manor, it was termed an 'advowson appendant.' But the owner might grant his advowson away to another in severance from the manor, or might sever it by conveyance of the manor with express exception of the advowson (*k*). And then it became what is termed an 'advowson in gross;' in such case it must be conveyed, like any other separate incorporeal hereditament, by a deed of grant (*l*). The severance once complete, the advowson could not again become appendant, though the manor and advowson become reunited in the same person (*m*). When not severed, the advowson would pass with the land, even without mention of the appurtenances (*n*). On the other hand, tithes, after they were diverted from their original purpose and had become the subject of

---

(*ii*) Burton on R. P., 375, and 3 Cruise, 22.

(*k*) 2 Da. i. 31, note.

(*l*) Co. Litt. 335*b*, ed. by Thomas, vol. i. p. 225.

(*m*) 2 Da. i. 31, note.

(*n*) 2 Bl. 22.

property, would not pass on a conveyance of the land with its appurtenances, if not specially mentioned (*o*).

The advowson itself may become the subject of division; the owner may grant to another the right to the next presentation. But in case the grantee die before exercising the right, the right will pass to his personal representatives, and not descend to the heir, as the advowson would descend on the death of the owner intestate (*p*).

Apportionment of tithes.

Under the Tithe Commutation Act (*q*), the rent-charge in lieu of tithes may be specially apportioned, so as to throw the amount attributable to the tithes of an entire estate upon some particular portions, in exoneration of the residue (*r*).

Merger.

Under the Commutation Acts, a tenant in fee or in tail in possession of tithes or rent-charge in lieu of tithes, or any person having power to acquire a fee simple therein, or the tenant for life in possession of both lands and tithes, was enabled, by deed to be approved by the Commissioners, and confirmed under their seal, to merge the tithes or commutation rent-charge in the land out of or in respect of which they issue (*s*). And all charges on tithes, &c., which are merged under the Acts are to have priority over any charges on the lands at the time of the merger.

Land presumed subject to tithe.

Title on sale of tithe.

On the sale of land tithe is a burden the existence of which is presumed in the absence of agreement. The Commissioners under the Acts have power in making their award to decide as between tithe-owner and land-owner, but not as between rival claimants of tithe (*u*). And where there has been a special apportionment of the rent-charge upon some particular portion of the estate in exoneration of the residue, the contract or conditions of sale should state either the fact or the amount actually payable (*x*). Upon the sale of tithes the vendor should protect himself from being required to produce the original grant (*y*), otherwise the abstract must show the original grant, as well as

(*o*) *Ib.*; and see 2 Da. i. 627; and 5 Da. ii. 225.

(*p*) *Rennell* v. *Bishop of Lincoln*, 7 B. & Cr. 113; and 8 Bing. 490. As to the statutes against simony—31 Eliz. c. 6, 1 Wm. & Mary, c. 16, and 12 Anne, c. 12; and their effect, see 2 Da. i. 32, and *Walsh* v. *Bishop of London*, L. R. 10 C. P. 518; and notes to *Fox* v. *Bishop of Chester*, Tudor's L. Ca. on Real Prop. p. 276.

(*q*) 6 & 7 Wm. IV. c. 71, s. 58.

(*r*) See 2 Da. i. 627; and 5 Da. ii. 223, note.

(*s*) A form of such deed for the merger of a rent-charge is given in 1 Prid. 430.

(*u*) Dart's V. & P. 352.

(*x*) *Ib.* 354.

(*y*) *Ib.* 166.

Chap. XIII.

a sixty (or forty) years' title (*a*). Production of the original grant is the only mode of repelling any claim by an ecclesiastical person *jure ecclesiæ* (*b*). How far the same rule may be applicable to a sale of a rent-charge in lieu of tithe may be doubtful, but it is certain that to prevent any question the vendor should protect himself by a condition properly framed as to the title he is to adduce.

Title on sale of advowson.

The Statute of Limitations (*c*) provides that no advowson shall be recovered but within three incumbencies, and that period must not extend beyond one hundred years (*d*); in the absence of agreement, Mr. Dart says (*e*):—

> "The title to an advowson must be carried back at least one hundred years; and the abstract should be accompanied by a list of the presentations during the period over which it extends. The rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for although a sixty or now a forty years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no destruction of the appendancy, by severance of the advowson, is disclosed by the earlier title" (*f*).

III. (*a.*) Common, rights of.

A right of Common, says Mr. Tudor (*g*), may be defined as a right which one person has of taking some part of the produce of land, while the whole property of the land itself is vested in another. He divides commons into four kinds—namely: I. Common of Pasture, or the right of feeding beasts upon the land of another; II. Common of Piscary, or the right of fishing in the waters of another; III. Common of Estovers, or the right of cutting wood on the land of another; IV. Common of Turbary, or the right of digging turves on the soil of another; to which, perhaps, may be added the similar right of getting sand, clay, stone, and even coals and other minerals on another's land.

Inclosure.

Rights of Common have been largely extinguished by Inclosure, as where the owner of the waste incloses or 'approves' so much

---

(*a*) Dart, 295, and see note (*n*), and 2 Da. i. 32, note, as to whether or not s. 1 of V. & P. Act, 1874 (37 & 38 Vict. c. 74), applies to tithes, so as to make forty years' title sufficient.

(*b*) Smith's Law of R. & P. Property, 44.

(*c*) 3 & 4 Wm. IV. c. 27.

(*d*) Ss. 30—33.

(*e*) Dart's V. & P. 293.

(*f*) See 2 Da. i. 30, for form of agreement for purchase of advowson with prospect of early possession, and at p. 356, form of grant of an advowson with the addition thereto at p. 357, note, to meet the Incumbents' Resignation Act, 1871; and see forms of grants of advowsons, 1 Prid. 427 *et seq.*

(*g*) L. Ca. on Real Prop. p. 127, notes to *Tyrringham's Case.*

of the waste as he pleases, provided he leave sufficient for those entitled thereto, or where a person without any title originally, by mere encroachment, has taken part of the waste and has acquired an absolute title by holding it for twenty years (*h*). But by 8 & 9 Vict. c. 118, the Commons Inclosure Act, subsequently amended and extended by several statutes, the Inclosure Commissioners for England and Wales (now called the Land Commissioners) (*i*) were appointed, under whose sanction inclosures may now be more readily effected, several local inclosures being comprised in one Act (*k*).

Commons Act, 1876.

But alarm having arisen by reason of the rapid inclosure of commons, and the effect thereof upon the health of the population which increases so rapidly, the Commons Act, 1876 (*l*), was passed. The reasons for it are fully set out in the preamble as follows :—

> "Whereas by the Inclosure Acts, 1845 to 1868, upon the application and with the consent of such of the persons interested in any common as in the said Acts in that behalf specified, the Inclosure Commissioners are empowered by provisional order under their seal to authorise the inclosure of such common, provided such inclosure is made on such terms and conditions as may appear to the Commissioners to be proper for the protection of any public interests, and provided also that the Commissioners are of opinion that such inclosure would be expedient, having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed, or any part thereof, may be situate (hereinafter included under the expression 'the benefit of the neighbourhood'), as to the advantage of the persons interested in the common to which such application relates (hereinafter included under the expression 'private interests'); but such provisional order is of no validity until and unless the Commissioners have, in a report to be laid before Parliament, certified that in their opinion the inclosure of such common, if made on the terms and conditions in their provisional order expressed, would be expedient, having regard to the benefit of the neighbourhood, as well as to such private interests as aforesaid, nor until and unless an Act of Parliament has been passed confirming such order and affirming such certificate as aforesaid, and directing that the proposed inclosure of the common should be proceeded with accordingly :

(*h*) See Tudor's L. Ca. on Real Prop., p. 149, notes to *Tyrringham's Case*. Though inclosure might have been effected by agreement, that was found impracticable, so it was done latterly by private Acts of Parliament, subject to the General Inclosure Act (41 Geo. III. c. 109).

(*i*) Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 48).

(*k*) Tudor's L. Ca., p. 151.

(*l*) 39 & 40 Vict. c. 56.

Chap. XIII.

"And whereas by the said Inclosure Acts, information is required to be supplied and inquiries to be made for the purpose of enabling the Inclosure Commissioners to judge of such expediency as aforesaid, but it is desirable to make further provisions for bringing under the notice of the said Commissioners, and of Parliament, any circumstances bearing upon the expediency of allowing the inclosure of a common, and that inclosure in severalty as opposed to regulation of commons should not be hereinafter made unless it can be proved to the satisfaction of the said Commissioners and of Parliament that such inclosure will be of benefit to the neighbourhood as well as to private interests, and to those who are legally interested in any such commons:

"And whereas by the said Inclosure Acts the Commissioners are empowered in the case of a common being waste land of a manor, to require, and in their provisional order to specify as one of the conditions of inclosure, the appropriation of an allotment for the purposes of exercise and recreation by the inhabitants of the neighbourhood, and also of an allotment for the labouring poor, and it is expedient to give further effect to the provisions relating to the said allotments (in this Act referred to as 'allotments for recreation grounds and field gardens'):

"And whereas it is expedient to give further facilities for enabling the Inclosure Commissioners to regulate, improve, stint, and otherwise deal with commons without wholly inclosing and allotting the same in severalty."

Thus, rights of Common, though probably very beneficial in the age and state of agriculture in which they originated, in later days, under the more progressive condition of the people, were found in the main injurious to agriculture and the profitable possession of land; accordingly the Legislature interfered to put an end to them by the separate inclosure of the lands the subject of the rights. And now, on the other hand, the Legislature is checking the inclosures, for fear that, while private interests may be benefited by them, the health of the community may suffer.

(b.) Way, rights of.

Another species of incorporeal hereditaments is that of Ways, or the right of going over another man's ground. It may arise by express grant; or it may be by prescription which supposes an original grant, as if all the owners and occupiers of such a farm have immemorially used to cross another's ground; or it may be by operation of law, that is, 'by necessity,' as where a man grants to another a piece of ground in the middle of his field, he at the same time impliedly gives a way to come at it (*m*). In the same manner a right of way will arise where the grantor conveys the

(*m*) 2 Bl. 36; see also notes to *Sury* v. *Pigot*, Tudor's L. Ca. on Real Prop. p. 205.

land surrounding a close, and retains the close; there is an implied grant, or re-grant, by the grantee to the grantor of the right of way to enable him to get to the reserved close. The question recently arose (*n*) whether such implied grant or re-grant was of a general right of way for all purposes, or only for the purpose of the enjoyment of the reserved close in its then state: it was held by Jessel, M.R., that, whatever might be the case if the inclosed piece of land was granted away, where it was reserved, it was only such a right of way as would enable the owner of the close to enjoy it as in the condition at the time of the grant; so that, if at the time of the grant the close was agricultural land, the owner of the close could claim only such a right of way as was suitable to the enjoyment of land in that condition, and not such as was suitable to its uses as building land.

Water, light, and air

Other instances of incorporeal hereditaments are the rights to running Water and to Light and Air (*o*).

Profits *à prendre*. Easements.

The latter incorporeal hereditaments referred to—namely, rights of way, to water, and to light and air—are also called 'easements,' as distinguished from rights of common, which are called 'profits *à prendre*' (*p*). An Easement has been defined (*q*) to be a privilege without profit, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to compel the owner thereof to permit to be done, or to refrain from doing, something on such tenement for the advantage of the former. Thus, if the owner of estate A. has a right of way over estate B., he can compel the owner of estate B. to permit him to go along the way. So, if the owner of estate A. has ancient lights in a house on his estate, he can compel the owner of estate B. not to do any act on his own land which will deprive him of his accustomed portion of light and air.

The former kind of easement is termed Affirmative; the latter, Negative.

Title.

The title to all these incorporeal hereditaments, whether profits *à prendre* or easements, and whether appendant, appurtenant, or in gross, depends upon grant, or upon prescription from immemorial user by which a grant is implied. It is said they may be

Custom.

(*n*) *Corporation of London* v. *Riggs*, L. R. 13 Ch. D. 798.

(*o*) See notes to *Sury* v. *Pigot*, Tudor's L. Ca. on Real Prop. 191 and 200; and Dart's V. & P. 356 *et seq.*

(*p*) Gale, 1.

(*q*) Notes to *Sury* v. *Pigot*, Tudor's L. Ca. on Real Prop. 167.

Chap. XIII.

also claimed by custom, but this is in effect the same as prescription, for immemorial usage supposes an original grant. The difference is thus explained by Lord Coke: "Prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or of those whose estate he hath; or in bodies politic or corporate, and their predecessors; but a custom which is local is alleged in no person, but laid within some manor or other place" (*r*).

No right can however be claimed by custom to a profit *à prendre in alieno solo* in a shifting body, like the inhabitants of a town or residents of a particular district. A claim was recently made by owners and occupiers of lands within a forest, to common of pasture over the wastes of the forest (*s*). It was urged on behalf of the occupiers that the claim could not be sustained, for it was to a profit *à prendre in alieno solo*, which cannot be vested in a body of occupiers by custom or otherwise. James, L.J., after stating the rule of law as above, said:—

"Construing the allegations here according to their plain meaning, it appears to me that if they were judged most strictly, the allegation here is of a right of common in the owners and occupiers of lands in respect of those lands; for it is in express terms claimed as a right of common, either appendant or appurtenant, for their cattle, levant and couchant, upon the tenements. That is an allegation of a right of common not unknown to the law—a right of common which is alleged as being appurtenant to land, and of course claimed by persons who are either owners or occupiers of the land in respect of which that easement is claimed. It appears to me that the occupiers have a right to join and to be joined, in any suit in this Court for that purpose. The occupier alone is entitled during the continuance of his occupancy; he may be an occupier for a long term of years, and he may be the only person substantially interested in the assertion of the right. Therefore, I cannot conceive that there is any objection to joining owners and occupiers in this way in their character of *quasi*-co-plaintiffs, and as persons on behalf of whom the right is alleged."

The Prescription Act, of which we are about to speak, relates to claims "which may be lawfully made at the common law by custom, prescription, or grant," to "any right of common or other profit, or benefit to be taken and enjoyed, &c.," and to "any way or other easement, or to any watercourse, or the use of any water to be enjoyed, &c." (*t*).

(*r*) Co. Litt. 113*b*, quoted in notes to *Tyrringham's Case*, Tudor's L. Ca. on Real Prop. 137.

(*s*) *Commissioners of Sewers* v. *Glass*, L. R. 7 Ch. App. 465. See *Goodman* v. *Mayor of Saltash*, L. R. 7 App. Ca. 633.

(*t*) 2 & 3 Wm. IV. c. 71, ss. 1 and 2.

Where an easement is created by express grant, it must be by deed (*u*).

By express grant.

We have seen that by the Statute of Uses every species of real property (except copyhold estates), whether corporeal or incorporeal, may be conveyed to uses. It is however said (*x*), that the property must be *in esse* at the time of the creation of the use. Therefore, if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses, no use can arise by virtue of such covenant upon lands of which he may afterwards become the purchaser. So, if A. convey his lands by bargain and sale to J. S. in fee, with a way over other lands, the right of way does not pass; because, by the operation of the bargain and sale, the use is first raised and vested in the bargainee, and consequently there is no previously existing seisin of the right of way, out of which the use can arise. And so it is said (*y*) :—

Statute of Uses.

"Neither can things which are mere rights be conveyed by way of use, as commons, &c., ways in gross, for a man cannot walk over ground to the use of a third person."

This is further explained by the words of the statute (*z*), being "of and in such like estates" (*a*), so that estates only could be raised by way of use, and the statute did not apply to the creation of other new interests (*b*), though when once created for a freehold interest, they could, as hereditaments, be conveyed to uses (*c*). This inconvenience, which specially arose under a conveyance to uses or under a power of sale and exchange, has been removed for the future by the Conveyancing and Law of Property Act, 1881 (*d*), which, in reference to conveyances made after 1881, enacts that a conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, &c., in, or over, or with respect to that land, or any part thereof, shall vest in possession in that person that easement, &c., for the estate or interest expressed to be limited to him.

Conveyancing Act, 1881.

A title by prescription—that is, by implied grant, could only

By prescription, fiction of lost grant.

(*u*) Co. Litt. 9*a*, ed. by Thomas, vol. ii. 333. A form of a grant of an easement will be found in 2 Da. i. 548; and see the note, which is a summary of Gale on Easements.

(*x*) Sanders on Uses, vol. i. p. 105.

(*y*) In Bacon's Abridgment, tit. Uses, (F).

(*z*) 27 Hen. VIII. c. 10, s. 1.

(*a*) See *ante*, p. 254.

(*b*) Except rent-charges, provided for by s. 5.

(*c*) Wolstenholme & Turner's note to Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 62.

(*d*) 44 & 45 Vict. c. 41, s. 62.

Chap. XIII.

be acquired by enjoyment "time out of mind," or, as it was alleged in pleading, "from time whereof the memory of man runneth not to the contrary."

Says Mr. Best:—

"When the statute of Westminster I. (*e*) had fixed a time of limitation in the highest real actions (*f*) known to the law, it was considered unreasonable to allow a longer time in claims by prescription. Accordingly, by an equitable construction of that statute, a period of legal memory was established in contradistinction to that of living memory, by which every prescriptive claim was deemed indefeasible, if it had existed previous to the first day of the reign of Richard I. (*g*); and, on the other hand, to be at once at an end if shown to have had its commencement since that period.

* * * * * *

"The time of prescription thus remaining unaltered, it is obvious that if strict proof were required of the exercise of the supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the rules of evidence established by the Courts. Modern possession and user being *primâ facie* evidence of property and right, the Judges attached to them an artificial weight, and held that when uninterrupted, uncontradicted, and unexplained, they constituted proof from which a jury ought to infer a prescriptive right coeval with the time of legal memory.

* * * * * *

"Notwithstanding the desire of the Courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user, however strong, was liable to be altogether defeated by showing the origin of the claim at any time since the 1 Richard I. Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may have perished by time or accident. "*Tempus*," says Sir Edward Coke, "*est edax rerum*; and records and letters patent, and other writings, either consume or are lost, or embezzled; and God forbid that ancient grants and acts should be drawn in question, although they cannot be shown which at the first was necessary to the perfection of the thing." Acting partly on this principle, but chiefly for the furtherance of justice and the sake of peace, by quieting possession, the Judges attached an artificial weight to the possession and user of such matters as lie in grant, where no prescriptive claim was put forward; and in process of time they established it as a rule that twenty years' adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant or other lawful origin of the possession" (*i*).

(*e*) 3 Edw. I. c. 39.

(*f*) The reign of Richard I. was made the time of limitation in a writ of right: 2 Bl. 31.

(*g*) A.D. 1189.

(*i*) Best on Evidence, 480.

Prescription Act.

In this state of things, the Prescription Act (*k*), entitled an Act for shortening the Time of Prescription in certain Cases, was passed, which, however, applies only to rights which are in some way appurtenant to a dominant tenement, not to rights claimed in gross (*l*). The preamble to the Act is as follows:—

> "Whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, &c."

The main provisions of the Act have been thus summarised (*m*):—

S. 1. "Claims to rights of common and other profits *à prendre* (except tithes, rent, and services) are not to be defeated after thirty years' uninterrupted enjoyment by showing that such right was first enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which it is now liable to be defeated; and when such right has been enjoyed as aforesaid for sixty years, it shall be indefeasible, unless had by consent or agreement.

S. 2. "A similar provision as to rights of way or water, or other easement, except that the periods are twenty and forty years respectively.

S. 3. "Right to light is to be indefeasible after enjoyment without interruption for twenty years unless it has been enjoyed by consent in writing.

S. 4. "The said periods are to be deemed those next before suit or action commenced questioning the right. No act to be deemed an 'interruption' unless acquiesced in for one year after notice" (*n*).

Application of Act.

To this should be added, that it is provided in the 6th section of the Act—

> S. 6. "That in the several cases mentioned in and provided by this Act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim."

So that evidence of enjoyment—*e.g.*, in the case of right of common, for twenty years only will not now raise any presump-

---

(*k*) 2 & 3 Wm. IV. c. 71.

(*l*) *Shuttleworth* v. *Le Fleming*, 14 W. R. 13.

(*m*) Marcey's Conveyancing Statutes.

(*n*) See *Bewley* v. *Atkinson*, L. R. 13 Ch. D. 283.

Chap. XIII.

tion. Otherwise the owner of the dominant tenement may still prove his rights over the servient tenement as before—for instance, in case of rights of common, where the title is one of two hundred or three hundred years the statute is not needed, and the title can be rested on the original right before the passing of the statute; the statute only applies to cases where you want to stand upon thirty years' user (*o*).

Effect of Act.

The statute has not altered the nature of the right, or the principle upon which it is to be determined whether the right has been infringed; but has merely substituted a statutory title for the fiction of a lost grant (*p*). Thus, as regards the right to light and air, it was contended (*q*) that enjoyment of free light and air for more than twenty years, gave under the statute an absolute and indefeasible right by way of property to the whole amount which came through the windows into the house. James, L.J., said:—

"I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable.

"Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree."

Right to a prospect—how acquired.

A right to a prospect can be acquired only by grant or covenant, not by prescription, or it may be acquired by contract (*r*).

Continuous and apparent easements and easements of necessity—implied grant on severance of tenements.

Besides the implication of a grant from prescription, there is implied a grant of certain easements on the sale of one of two or more tenements belonging to the same owner, called 'continuous and apparent' easements, on the principle that a man cannot derogate from his own grant (*s*); and also in case of easements 'of

(*o*) *Per* Hatherley, L.C., in *Warwick* v. *Queen's College*, L. R. 6 Ch. Ap. 728.

(*p*) *Per* Lord Selborne, *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. App. p. 219.

(*q*) *Kelk* v. *Pearson*, L. R. 6 Ch. App. p. 809.

(*r*) Notes to *Sury* v. *Pigot*, Tudor's L. Ca. on Real Prop. 203. And see *ante*, p. 150, note.

(*s*) *Ib.* 173.

necessity,' there is implied a grant (*t*). 'Continuous' easements are "those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a waterspout or right to light and air" (*u*). Among such continuous easements, drains have been included (*x*). 'Discontinuous' easements, on the other hand, are "those the enjoyment of which can only be had by the interference of man, as rights of way, or a right to draw water" (*y*).

An 'apparent' easement is not only one which must necessarily be seen, but such as may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*z*).

Questions have arisen in regard to 'continuous and apparent' easements, and easements 'of necessity,' in cases where the owner of one tenement has sold a part and retained a part, or has at the same time sold the whole in parts to different purchasers. It has been decided (*a*), on the principle that a grantor shall not derogate from his grant, that—(1) on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (that is, *quasi*-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted; and (2), if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, subject to the exception as to ways and other easements of necessity (*b*). Therefore, where a workshop and an adjacent piece of land were sold and conveyed by one owner to different purchasers at different times, and on the sale and conveyance of the piece of land, which happened first, the vendor had not reserved the rights of access of light to the windows of the workshop, the purchaser of the land could build so as to obstruct its windows (*c*). On the other hand, it has been subsequently held, that where the owner of a house and land adjacent

(*t*) *Ib.* 177; and *Wheeldon* v. *Burrows*, L. R. 12 Ch. D. 57. *Ante*, p. 350.

(*u*) Gale, p. 25, quoting from the Code Civil.

(*x*) Gale, 90; and *per* Blackburn, J., in *Pearson* v. *Spencer*, 4 L. T. (N. S.), 769.

(*y*) Gale, 25.

(*z*) *Pyer* v. *Carter*, 1 H. & N. 916.

(*a*) *Wheeldon* v. *Burrows*, L. R. 12 Ch. D. 31.

(*b*) *Per* Thesiger, L.J., 49.

(*c*) *Ib.*

Chap. XIII.

sells the house and land to different parties at the same time, the conveyance of the house being expressed to be "with all lights," &c., the purchaser of the land could not block up the lights (*d*).

Extinguishment.

All the above rights of common and profits *à prendre* and easements may be extinguished by express release, by unity of seisin or ownership of the dominant and servient tenement (*e*), or by abandonment. In order to establish abandonment, it is not necessary to show any definite period of non-user: the period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; what period may be sufficient in any particular case must depend on all the accompanying circumstances. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material (*f*).

General words.

Hitherto the law has been that rights of common which were appendant to the lands in respect of which they were exercised, and which were legally appurtenant, would pass by a conveyance of the property simply (*g*); but if such rights, though reputed to belong to or usually enjoyed with the lands, were not strictly appurtenant to them, they would not pass by the conveyance of the lands merely, though expressed to be with the appurtenances: in order to pass, there must have been an express or a general description of them; hence, the insertion of what are called 'general words' after the parcels in a conveyance, so as to include reputed rights and easements (*h*).

Conveyancing Act, 1881.

But now, in conveyances made after 1881, these so-called 'general words' are implied by virtue of the Conveyancing and Law of Property Act, 1881 (*i*), if and as far as a contrary inten-

(*d*) *Allen* v. *Taylor*, L. R. 16 Ch. D. 355.

(*e*) As to the re-creation of rights thus extinguished or suspended, see *James* v. *Plant*, 4 Ad. & Ell. 749; and *Kay* v. *Oxley*, L. R. 10 Q. B. 360.

(*f*) *Per* Lord Denman, C.J., in *Queen* v. *Chorley*, 12 Q. B. 519; and see *per* Lord Chelmsford, L.C., in *Crossley* v. *Lightowler*, L. R. 2 Ch. Ap. 482. See further, on extinguishment, the notes to *Tyrringham's Case* and to *Sury* v. *Pigot*, in Tudor's L. Ca. on Real Prop.; and also as to the right of an owner to the natural support of his lands, his right to the support of his buildings from adjacent land, and by other buildings, &c.

(*g*) 1 Da. 91.

(*h*) Forms will be found in the books, specially adapted to different kinds of property. A recent instance of the effect of these words is to be found in *Kay* v. *Oxley*, L. R. 10 Q. B. 360.

(*i*) 44 & 45 Vict. c. 41, s. 6.

tion is not expressed in the conveyance. The Act gives a general description of the rights to be included by implication in a conveyance—(1) of land; (2) of land having houses or other buildings thereon; and (3) of a manor.

IV. Rents.

Rent is another instance of an incorporeal hereditament. This includes, in addition to the rents spoken of previously (*k*), a rent-charge, thus clearly defined by Littleton (*l*):—

Rent-charge.

"If a man by deed indented at this day maketh such a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, it shall be lawful for him and his heirs to distrain, &c.; such a rent is a rent-charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and his heirs a certain rent without any such clause put in the deed, that he may distrain, then such rent is rent-seck; for that he cannot come to have the rent, if it be denied, by way of distress."

By 4 Geo. IV. c. 28, the power of distress was made incident also to a rent-seck; but it was still necessary to give expressly the right of entry (*m*).

Conveyancing Act, 1881.

Remedies.

Now, by the Conveyancing and Law of Property Act, 1881 (*n*), where, under an instrument coming into operation after 1881, if and as far as a contrary intention is not expressed in it, a person is entitled to receive out of any land, or its income, any annual sum charged on the land or income, by way of rent-charge or otherwise, not being rent incident to a reversion, he shall have, so far as they might have been conferred by the instrument, the following remedies—namely: (1) by distress after twenty-one days' arrear, for arrears; (2) entry and possession till payment, after forty days' arrear, for arrears then, or becoming due during possession; and (3) also after forty days' arrears, whether taking possession or not, by deed (*o*) to demise the land charged to a trustee for a term by mortgage, sale, or demise, or by any other reasonable means to raise and pay the annual sum and all arrears due or to become due. The last remedy, except that a power to limit a term is given in lieu of one being limited, which is more common (*p*), is usually inserted in settlements where it is intended to secure an annuity on the land.

(*k*) *Ante*, pp. 35, 148, 205.
(*l*) S. 217, ed. by Thomas, vol. i. 445.
(*m*) 2 Da. i. 509, note.
(*n*) 44 & 45 Vict. c. 41, s. 44.
(*o*) See example, 3 Da. ii. 1049.
(*p*) See 3 Da. ii. 1039 and 1041.

Chap. XIII.

Redemption.

Also, by the Conveyancing and Law of Property Act, 1881 (*q*), provision is made for payment to the person absolutely entitled to the rent, or empowered to dispose thereof absolutely or to give an absolute discharge for its capital value, of such sum as is certified by the Land Commissioners to be its value, and redemption thereby of all perpetual annual charges, including a rent-charge, and a 'quit rent' and a 'chief rent,' but not a tithe rent-charge, or rent reserved on a sale or lease, or rent payable under a grant or licence for building purposes.

Chief rents. Quit rents.

'Chief rents' are the fixed rents paid by the freeholders of a manor, and, together with those paid by the copyholders, are called 'quit rents' (*r*), because thereby the tenant goes free of all other services (*s*).

Annuities.

Rent-charges are often used in wills and settlements to secure an annuity, whether for life or years, or in fee. They are created usually under the Statute of Uses, which relates to them as to estates (*t*). Where an annuity or rent-charge has been granted, otherwise than by marriage settlement, or will, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, it must be registered in order to affect lands as to purchasers, mortgagees, or creditors, according to the provisions of the Act for the Protection of Purchasers against Judgments (*u*). But, notwithstanding the annuity deed has not been registered, the annuity will be valid against all subsequent incumbrancers who took with notice, and against the trustee in bankruptcy of the grantor (*uu*). The recent statutory provisions as to judgments and Crown debts (*x*) do not apply to annuities, therefore on a purchase search should also be made in respect of them in the Central Office of the Supreme Court of Judicature.

Fee-farm rents.

A common form of rent-charge is that known as 'fee-farm,' and arises where land is sold for building purposes and granted in fee simple subject to a perpetual rent-charge. Formerly (*xx*), it was essential to reserve a power of distress; for since the

---

(*q*) 44 & 45 Vict. c. 41, s. 45; and 45 & 46 Vict. c. 38 (Settled Land Act, 1882), s. 48.

(*r*) *Quieti reditus.*

(*s*) 2 Bl. 42.

(*t*) 27 Hen. VIII. c. 10, ss. 4, 5; *ante*, p. 353, note. See instances in Da. Con. Prec. 409 and 484.

(*u*) 18 Vict. c. 15, ss. 12, 14.

(*uu*) *Greaves* v. *Tofield*, L. R. 14 Ch. D. 563.

(*x*) *Ante*, pp. 103 *et seq.*, and 265.

(*xx*) Before 4 Geo. IV. c. 28.

Statute of *Quia Emptores*, the grantor parting with the fee is without any reversion, and without a reversion there cannot be a rent-service: so the rent reserved in such case, if power of distress were not expressly given, would be a rent-seck (*y*). The true meaning of 'fee-farm' seems to be a perpetual farm or rent; the name being founded on the perpetuity of the rent (*z*). In order to effectually secure the payment of the rent-charge, the purchaser is usually made to covenant to erect buildings of a certain value, and to keep them in repair (*a*). But it has been recently decided that where land has been granted in fee, in consideration of a rent-charge and a covenant to build and repair buildings, the assignee of the grantee of the land is not liable, either at law, or in equity on the ground of notice, to the assignee of the grantee of the rent-charge on the covenant to repair (*b*). Also to secure the rent-charge the purchaser is made to covenant to pay the rent. But, says Mr. Dart (*c*) :—

"It is not perfectly clear whether such covenant runs with the land, so as to be enforceable by the vendor or his representatives against each successive owner (*d*); but in order that it may have this effect, it is essential that the alienee, against whom the covenant is sought to be enforced, should have the estate of the original purchaser. Where this is not the case—as where, in a conveyance to A. in fee, to such uses as B. shall appoint, and in default of appointment, to the use of B. in fee, B. covenants for himself, his heirs, and assigns, with the vendor for payment of a rent-charge issuing out of the land, and afterwards, in exercise of his power, appoints to C.—it is settled that no action upon the covenant will lie against the alienee. In the case just put, C. takes, not as transferee of B.'s estate, to which the liability to pay the rent-charge was annexed; but as appointee under a power, the exercise of which defeated B.'s estate."

Conveyancing Act, 1881.

Now, as regards the right of re-entry (with certain exceptions, including that for non-payment of rent) reserved to the vendor and his representatives for breach of any covenant or condi-

(*y*) *Reditus siccus.*

(*z*) Not on the *quantum*, as represented by Blackstone, vol. ii. 43; see Mr. Hargraves' note to Co. Litt. 143*b*, ed. by Thomas, vol. i. p. 446.

(*a*) See forms, 2 Da. i. 504; and Da. Con. Prec. 138.

(*b*) *Haywood* v. *Brunswick Building Society*, L. R. 8 Q. B. D. 403; *ante*, p. 150, note.

(*c*) V. & P. 765.

(*d*) This is not affected by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 58. Before 3 & 4 Wm. IV. c. 27, s. 36, abolished real actions, a real action would lie for recovery of a rent-charge in fee; but such higher remedy having been abolished, an action of debt was maintainable: *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368.

Chap. XIII.

tion (*dd*), the Conveyancing and Law of Property Act, 1881 (*e*), provides that it shall not be enforceable until after notice specifying the breach, and there being failure within a reasonable time after to remedy the breach, if capable of remedy, and to pay reasonable compensation.

Apportionment.

Formerly, like a condition (*f*), a rent-charge could not be apportioned, "because the rent is entire and against common right, and issuing out of every part of the land," and "there is no connexion of tenure between the grantor and grantee as there is in the case of a rent-service" (*g*). Therefore, if the owner of a rent-charge purchased any part of the land out of which it issued (*h*), or any part of the land were released from it, the rent-charge became extinct (*i*). But by one of the Inclosure, &c., of Lands Acts (*k*), provision was made for apportionment of the rent by the Inclosure Commissioners (now the Land Commissioners) (*kk*) among the lands charged on the application of any persons respectively interested in the lands and in the rent, in all cases where any lands or hereditaments are charged with any fee-farm rent, rent-seck, rent of assize (*l*), or chief rent, or other annual or periodical fixed rent, or other certain payment. And then by the Act to further Amend the Law of Property, 1859 (*m*), he was enabled to release part of the land charged without thereby extinguishing the charge: the Act provided:—

Release.

> S. 10. "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

In respect of lands required for public undertakings, special provision is made by the Lands Clauses Consolidation Act, 1845 (*n*), for the release of lands required from any rent-charge affecting them, whether the whole or a part only be charged on them.

(*dd*) That is, where it is binding.

(*e*) 44 & 45 Vict. c. 41, s. 14. *Ante*, p. 157.

(*f*) *Ante*, p. 154.

(*g*) Co. Litt. 147*b*, ed. by Thomas, vol. i. 464.

(*h*) And this is still so where advantage is not taken of 17 & 18 Vict. c. 97; see Dart's V. & P. 131, 919.

(*i*) *Ib.*

(*k*) 17 & 18 Vict. c. 97, ss. 10, 14; and see 1 Da. 545, 687.

(*kk*) 45 & 46 Vict. c. 38 (Settled Land Act, 1882), s. 48.

(*l*) *i.e.*, the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied—that is, the quit-rents above spoken of; 2 Bl. 42.

(*m*) 22 & 23 Vict. c. 35, s. 10.

(*n*) 8 Vict. c. 18, ss. 115—118.

CHAPTER XIV.

STATUTES OF LIMITATION.

Principles of.

HITHERTO, in considering the modes by which property may be acquired, attention has been addressed to those more ordinary and natural modes of acquisition represented by sale, gift, surrender or release. In this chapter attention is directed to one of a totally different character,—one by which a possession originally wrongful may become rightful by the omission of the original owner to take steps in assertion of his right. This mode of acquiring a good title to property, the possession of which was in its inception wrongful, is by virtue of the Statutes of Limitation. It has been said (*a*):—

"The Statutes of Limitation are laws of peace and justice. When property has been so long in the possession of a family, that it has passed to the children and grandchildren of those who first acquired it, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came (never having enjoyed it) suffer but little from its loss. After a great lapse of time it is impossible to get at truth, so as to do justice upon any case. You have some documents, but you may not have all that relate to the title, and those which are lost might have explained or perhaps done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of the transaction complete, and for a decision, cannot. These were the reasons why the Legislature passed the Statutes of Limitation."

History of the law of limitation.

By the Common Law there was no stated or fixed period within which it was necessary to commence actions, but afterwards certain remarkable events were from time to time selected for that purpose, as the return of King John from Ireland, and the coronation of Henry III. (*b*).

21 Jac. I. c. 16.

Under 21 Jac. I. c. 16, s. 1, an uninterrupted adverse possession for twenty years operated as a complete bar to an action in ejectment, except under circumstances of disability (*c*). The

3 & 4 Wm. IV. c. 27.

(*a*) *White* v. *Parnther*, Knapp, 227.

(*b*) Shelford's Real Property Statutes (1st ed.), 79.

(*c*) Broom's Commentaries (3rd ed.), 183.

Chap. XIV.

next statute, 3 & 4 Wm. IV. c. 27, entitled an Act for the Limitation of Actions and Suits relating to Real Property and for simplifying the Remedies for trying the Rights thereto, was founded on the general principle that twenty years was an allowance of time reasonably sufficient in every case for the recovery of any land or rent by entry, distress, or action, provided the claimant labored under no disability to assert his pretensions. Suits in equity (*d*) were also by this Act expressly limited to the same periods as actions at law, subject to exception in certain cases of fraud and trust. Also special provision was made for claims to church property and advowsons (*e*). And the doctrine of non-adverse possession was got rid of; so the question was no longer whether the possession of a person holding land without title was 'adverse' to the right of the lawful claimant, or, in other words, whether such possession was in its character inconsistent with the title of the true owner; the question instead was simply whether the time had elapsed since the claimant's right accrued, whatever the nature of the present holder's possession (*f*).

Adverse possession.

Crown.

9 Geo. III. c. 16.

24 & 25 Vict. c. 62.

That statute did not, however, apply to the case of the Crown being a party, and at common law the maxim is, *nullum tempus occurrit regi;* but by the *Nullum Tempus* Act (*g*) the rights of the Crown as regards lands and rents are barred after the lapse of sixty years.

Application of 3 & 4 Wm. IV. c. 27.

Two questions arose under the statute 3 & 4 Wm. IV. c. 27, as to its application—namely, (1) to rents reserved upon a lease; and (2) to the case of a mortgagee who had not entered into possession. It was provided (*h*) that the word 'rent' should extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and it was enacted (*i*) that no one should "make an entry or distress, or bring an action to recover any land or rent," but within twenty years after the right had accrued to the claimant

(*d*) S. 24.

(*e*) Ss. 29—34. *Ante*, p. 348.

(*f*) *Nepean* v. *Doe*, 2 M. & W. 911; Darby & Bosanquet, 204: and see *per* James, L. J., in *Vane* v. *Vane*, L. R. 8 Ch. Ap. 397.

(*g*) 9 Geo. III. c. 16, amended by 24 & 25 Vict. c. 62.

(*h*) S. 1. "Rent" includes ...

(*i*) S. 2, repealed by 37 & 38 Vict. c. 57, s. 9, and s. 1 of that statute enacted in its place, thereby substituting the period of twelve years for twenty years.

or some person through whom he claimed; and it was defined (*k*) at what time the right to "make an entry or distress, or bring an action to recover any land or rent," should be deemed to have first accrued.

Rent reserved on a lease.

As regards the first question, it was decided that 'rent' did not refer to rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation; but was confined to rents existing as an inheritance distinct from the land, such as ancient rents-service, fee-farm rents, or the like. And therefore a person entitled to the reversion expectant on the determination of a lease might distrain for the rent thereby reserved at any time during the existence of the lease, although no payment of rent had been made for more than twenty years (*l*). The reasons for this decision were thus given by Rolfe, B.:—

"In order to come to a just conclusion as to the meaning of the word 'rent,' as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word "recover," (any land or rent, but within twenty years, &c.). Now, so far as relates to land, the word "recover," in this passage clearly means the same thing as 'obtain possession or seisin of.' The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted.

"If such be the meaning of the word "recover," when used with reference to one of its objects—'land'—it is very reasonable to suppose that the Legislature intended it to have the same meaning in respect to the other object—'rent.' It is true, indeed, that with respect to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the *terre*-tenant as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still, before the passing of this Act, a party seised of rents, whether rents-service, rent-charges, or rents-seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, '*quod recuperet seisinam*;' and in each case the party was entitled to a writ of *habere facias seisinam*, which in case of a recovery of rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin, with all its consequences, as in the case of a subsequent disseisin of lands or houses.

(*k*) S. 3. (*l*) *Grant* v. *Ellis*, 9 M. & W. 113.

Chap. XIV.

"Now we are of opinion, that it is to this sort of recovery only that the second section of the statute has reference; for such is clearly the meaning of the word "recover," when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course, that the word 'rent,' in the second section, must necessarily be confined to rent which might in its nature have been the object of such a recovery; and this certainly does not include the rent reserved on common leases for years."

By the same statute it was also enacted (*m*) that "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent," &c., should be "recovered by any distress, action, or suit, but within six years," &c. But the statute passed a few weeks later, and entitled an Act for the further Amendment of the Law (*n*), contained a provision (*o*) that "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty," &c., should be commenced within twenty years after the cause of action. It was found difficult to reconcile these enactments. It was first decided that an action for arrears of rent upon the covenant to pay in an indenture of lease might be brought within the time limited by the later Act (*p*); and then that in a suit in equity for the purpose of establishing an incumbrance—namely, an annuity charged on the lands, secured also by the personal covenant of the grantor, the earlier Act applied, and only six years' arrears could be recovered (*q*). It was expressed by Lord Cottenham (*r*), that the first Act must be considered as applicable only to the land, and the latter as applicable only to the person: the combined effect of the two enactments was that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent could be recovered by any distress, action, or suit, other than and except in actions upon covenant or debt upon specialty, in which case the limitation would be twenty years.

3 & 4 Wm. IV. c. 42, s. 3.

Clarkson v. Henderson 2 H. 14 Ch. D. 348. explained and r

Lessor's right to recover possession.

It was provided by the earlier Act (*s*) that when the estate or interest claimed shall have been in reversion or remainder, the

(*m*) 3 & 4 Wm. IV. c. 27, s. 42.
(*n*) 3 & 4 Wm. IV. c. 42.
(*o*) S. 3. See *ante*, p. 111, note.
(*p*) *Paget* v. *Foley*, 2 Bing. N. C. 679.
(*q*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640.
(*r*) *Ib.* p. 652.
(*s*) 3 & 4 Wm. IV. c. 27, s. 3.

right to make an entry, or bring an action to recover the land, shall be deemed to have first accrued at the time at which such estate or interest became one in possession; accordingly, notwithstanding non-payment of rent, the lessor's right to recover possession of the premises demised accrues only on the determination of the lease, and time in that respect will commence to run against him only from that event (*t*).

Mortgagee out of possession.

As regards the second question (*u*), no special provision was made by the statute 3 & 4 Wm. IV. c. 27, for the case of a mortgagee out of possession, and doubts were entertained (*x*) whether one not proved to have been in possession or receipt of the rents and profits within twenty years, and to whom an acknowledgment of title, which was equivalent to possession or receipt of rent, had not been given (*y*), had a right to enter upon the mortgaged property, or to bring an action of ejectment for its recovery (*z*), or a suit for foreclosure of the equity of redemption.

The statute provided (*a*) that no suit in equity should be brought after the time when the plaintiff, if entitled at law, might have brought an action, and (*b*) that no action, suit, or other proceeding, should be brought to recover any money secured by mortgage, &c., but within twenty years, unless some part of the principal money or some interest had been paid, or some acknowledgment of the right thereto had been given in writing, signed by the person by whom it was payable, or his agent, to the person entitled thereto, or his agent. Under ordinary circumstances the possession of a mortgagor was not, before this Act, considered adverse to the mortgagee (*c*). To remove these doubts the Act 7 Wm. IV. & 1 Vict. c. 28 was passed, by which it was enacted:—

7 Wm. IV. & 1 Vict. c. 28.

> "It shall, and may be, lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the 1st section of the said Act (*d*), to make an entry or bring an action at law, or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time

(*t*) *Doe* v. *Oxenham*, 7 M. & W. 131.
(*u*) *Ante*, p. 364.
(*x*) *Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 291.
(*y*) S. 14.
(*z*) Ss. 2, 3.
(*a*) S. 24.
(*b*) S. 40, repealed by 37 & 38 Vict. c. 57, s. 9; and s. 8 of that statute enacted in its place, thereby substituting the period of twelve years for twenty years. See *post*, p. 378.
(*c*) Darby & B. 353.
(*d*) 3 & 4 Wm. IV. c. 27.

Chap. XIV.

at which the right to make such entry, or bring such action, or suit in equity, shall have first accrued, anything in the said Act notwithstanding."

'Land' within the definition referred to extends to—

"Manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure" (*e*).

Not applying to rent-charge.

"The object of the restriction to land," it has been observed (*f*), "is not clear; rent-charges may be, and sometimes are, the subject of mortgage, and it is hard to point out any reason why mortgagees of land or tithes should, by receiving interest, retain their right to bring an action to recover such land or tithes, which does not equally hold good in favor of the right of a mortgagee of a rent-charge to recover such rent-charge by distress. The above enactment does not in words take away from the mortgagees of rent-charges any saving of their rights, which payment of interest might have effected under the earlier statute; but as mortgages of rent are plainly excluded from the benefit of the later enactment, and there is no section in the earlier Act which gives to the receipt of interest the effect of preserving the mortgagee's right, it may be considered pretty clear that receipt of interest on a debt secured by a mortgage of rent-charge will not have the effect of keeping alive the right of the mortgagee to distrain for the rent-charge on the land, out of which it issues."

By the Real Property Limitation Act, 1874 (*g*), which came into operation on the 1st of January, 1879 (*h*), it was expressly enacted that the provisions of the statute 7 Wm. IV. & 1 Vict. c. 28, shall remain in full force, and be construed together with the new Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

By whom payment must be made within 7 Wm. IV. & 1 Vict. c. 28.

It has been recently held (*i*) that a foreclosure action is an action for the recovery of land within 7 Wm. IV. & 1 Vict. c. 28; also that a payment within the meaning of that statute must be of principal or interest, and by the mortgagor or some person bound to pay on his behalf, and payment of rent by a tenant after notice by the mortgagee is not such payment. An action for foreclosure in respect of the mortgaged property was brought in August, 1880, the last payment of interest having been made in

(*e*) 3 & 4 Wm. IV. c. 27, s. 1.
(*f*) Darby & Bosanquet, 354.
(*g*) 37 & 38 Vict. c. 57, s. 9.
(*h*) S. 12.
(*i*) *Harlock* v. *Ashberry*, L. R. 19 Ch. D. 539.

August, 1859. On 22nd June, 1878, Wade, one of the tenants of the mortgaged premises, in consequence of a notice from the mortgagees that they claimed the estate, paid them £5 for half a year's rent. It was in the first instance (*k*) held that such payment was sufficient to bar the statute, and judgment was given for foreclosure in respect of all the mortgaged property; but on appeal the action was dismissed, so far as regards all the land, except that in the occupation of Wade. In his judgment, Jessel, M.R., after stating that the Court was bound by authority to hold that the action was for the recovery of land, said :—

"The question is whether section 2 of 3 & 4 Wm. IV. c. 27, is applicable, or whether by reason of the enactment of 1 Vict. c. 28, time has not run, "although more than twenty years may have elapsed since the time at which the right to bring such action or suit in equity" (*i.e.*, to recover land) "shall have first accrued."

"In this case, in 1878, the mortgagees called on the tenants of the land in mortgage to pay rent to them, and one of the tenants, named Wade, in answer to that call, paid them £5, a half-year's rent of the part occupied by him. The only question is, whether that payment was a payment of any part of the principal or interest within the meaning of the later enactment.

"That payment was admittedly made as rent, it was required to be paid as rent; and was received as rent. The argument on the part of the respondents, which succeeded before Mr. Justice Fry, was this, that the statute does not require the payment to be made by any particular person, that a payment of rent by a tenant to a mortgagee will have to be taken into account, and allowed for as between the mortgagee and his mortgagor, and that consequently it amounts to a payment of principal or interest within the statute.

"The answer to this argument, and I conceive it to be a correct answer, is twofold. It is said in the first place it is not a payment of principal or interest, and secondly, that in order to be a payment within that statute it must be made by a person liable to pay principal or interest, and in this case it was not made by a person liable to pay principal or interest. I do not think that this was a payment of principal or interest at all. It is quite true that at the end of the account to be taken between mortgagor and mortgagee it may be that this payment will go against principal or interest; but so long as the account remains open between them, the mortgagee is entitled out of the receipts to deduct his expenses for repairs and other just allowances; and it is only the final entry on the whole account which shows on which side the balance lies. There is no appropriation of any one payment at any time to any particular item unless there has been an actual appropriation at the time by contract between the parties. It is impossible to say that any particular item upon one side corresponds with any particular item upon the other side of the account.

(*k*) L. R. 18 Ch. D. 229.

Chap. XIV.

"It is only on the final result of the account as taken between mortgagor and mortgagee that there can be any appropriation of the rents to principal or interest.

"The second part of the answer was, whether the payment was or was not a payment of principal or interest, it was not made by a person liable to pay principal or interest. The person who paid was tenant—he paid the £5 as rent; how could it be said to be paid in any other character? The mortgagees received it as rent as the legal owners of the property. It was quite immaterial to the tenant whether the mortgage was or not subsisting. If all the mortgage debt had been paid with the exception of £4, the mortgagees could still exact the whole £5 as a rent, although, of course, they would have to account for it to their mortgagor.

"The question is: was the payment made by the mortgagor or any person liable to pay?

"Clearly the tenant is not liable to pay either the principal mortgage money or interest; he is liable to pay rent whether the amount of the rent be more or less than the amount of the interest on the mortgage debt. The underlying principle of all the Statutes of Limitation is, that a payment to take a case out of the statute must be a payment by a person liable, as an acknowledgment of right.

* * * * * *

"On principle and on authority I think that the payment, to take the case out of the statute, must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment.

"Even if there were evidence of the fact, I think that the doctrine of ratification would not apply, because it was not a payment on behalf of the mortgagor, but simply a payment which the tenant, as tenant, was bound to make. The character of that payment could not be altered by anything done afterwards between the mortgagor and mortgagees.

"There could not be a ratification in law, and there was no evidence of it in fact. I thought it right to observe upon the point, because Mr. Justice Fry seems to have considered that there had been such a ratification and adoption by the mortgagor of the payment of rent by Wade as to make the payment a payment on behalf of the mortgagor.

"The appeal must, therefore, be allowed as to all the property included in the mortgage, except as to that part which was in the possession of Wade, of which possession was taken two and a-half years ago by this payment of rent, and so section 2 of 3 & 4 Wm. IV. c. 27, does not apply."

An action for foreclosure is an action for recovery of land within 7 Wm. IV. & 1 Vict. c. 28.

In the leading authority by which the Master of the Rolls said, in the above case, that the Court was bound to hold that an action for foreclosure was one for the recovery of the land within the meaning of 7 Wm. IV. & 1 Vict. c. 28 (*l*), the material facts were these:—

(*l*) *Heath* v. *Pugh*, L. R. 6 Q. B. D. 345, see 357; confirmed by the House of Lords, L. R. 7 App. Ca. 235.

(1) A legal mortgage of land to the plaintiffs, dated the 24th of November, 1856, to secure £7,700 and interest; (2), a subsequent conveyance of the equity of redemption by the mortgagor (Stephens) to the defendant in 1859; (3), bill filed by the plaintiffs against Stephens and the defendant for redemption or foreclosure in 1870; (4), decree in 1874 against both defendants to the suit for the usual accounts, and for redemption or foreclosure; (5), subsequent proceedings according to the usual course of the Court of Chancery, ending in an order of foreclosure absolute against the present defendant on the 6th of September, 1877. There was no proof of payment at any time of any sum on account of principal or interest upon the mortgage, nor of any acknowledgment in writing of the plaintiff's title by the defendant.

The judgment of the Court of Appeal, delivered by the Lord Chancellor (*m*), so fully goes into the law of mortgage, and the Statutes of Limitation in relation thereto, that it is here given *in extenso*:—

"The law of mortgage is a familiar and very important branch of English jurisprudence, which, when the statute 3 & 4 Wm. IV. c. 27 was passed, was well understood on both sides of Westminster Hall. Several sections of that statute, and the whole of the later Act, 1 Vict. c. 28, expressly relate to it. By 7 Geo. II. c. 21, the Courts of Common Law had been enabled and directed, in any action for recovery of a mortgage debt, or for the possession of mortgaged land (unless proceedings were at the same time depending in equity), to give effect upon the defendant's application to his right of redemption and re-conveyance, in much the same way as a Court of Equity would have done. The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be 'at the will,' or by the 'sufferance' or 'permission' of the mortgagee, under a 'tacit agreement' which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits as long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee. The former Statute of Limitations (*n*) did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee (*o*). It may be added, that by the Judicature Act of 1873 (*p*), a mortgagor, entitled for the time being to the possession of land, as to which no notice of his intention to take possession has been given by the mortgagee, is recognised as having a right in respect of which it was thought fit that he should be enabled to

(*m*) Lord Selborne: L. R. 6 Q. B. D. 859.

(*n*) 21 Jac. I., c. 16.

(*o*) *Keech* v. *Hall*, 1 Dougl. 21; *Moss* v. *Gallimore*, 1 Dougl. 279; *Partridge* v. *Bere*, 5 B. & A. 604; *Hall* v. *Doe* d. *Surtees*, 5 B. & A. 687; *Leman* v. *Newnham*, 1 Ves. Sen. 51; *Doe* v. *Williams*, 5 Ad. & El. 291.

(*p*) S. 25.

Chap. XIV.

sue for possession, and for the recovery of rents and profits, in his own name.

"In equity (where this branch of our jurisprudence originated) the conveyance of the legal estate to a mortgagee was regarded as nothing more than a security for a debt. During the subsistence of the equity of redemption, the debt, together with this benefit of the security, passed to the executor by a will of personal estate, and the legal title to the land did not pass by a general devise of all the mortgagee's real estate in a will duly attested, because it was not regarded in equity as any part of that estate. As to the equity of redemption, it is sufficient to quote Lord Hardwicke's words in the leading case (*q*):—"An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and, therefore, cannot be considered as a mere right only; but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets. . . . The interest in the land must be somewhere, and cannot be in abeyance, but it is not in the mortgagee, and, therefore, must remain in the mortgagor. A. devises his estate, and afterwards makes a mortgage in fee; though this is a total revocation in law, yet in this Court it is a revocation *pro tanto* only" (*r*).

"This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released. "A foreclosure" (said Lord Hardwicke) "is considered as a new purchase of the land." "The mortgage being foreclosed" (said Sir William Grant), "the estate became absolutely his." "By the order made in the foreclosure suit" (said Sir Lancelot Shadwell), "he became the absolute owner" (*s*). The title obtained by such 'new purchase,' did not, before the Wills Act of 1838, pass by general words in a will duly attested to pass real estate, made before the foreclosure, and not afterwards republished; it did ~~not~~ pass, if such will were republished after foreclosure, or if a new will in like general terms were then made.

"It follows from this state of the law, that when the owner of land, under an ordinary decree of foreclosure absolute, takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property; and that it can make no difference whether the title which he previously had as a mere incumbrancer was, or was not, protected by a legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might

---

(*q*) *Casborne* v. *Scarfe*, 1 Atk. 603; and 2 Tudor's L. Ca. 1055.

(*r*) And see *Blake* v. *Foster*, 2 Ball & Beatty, 402 and 403.

(*s*) *Casborne* v. *Scarfe*, 1 Atk. 603; 2 Tudor's L. Ca. 1055; *Silberschildt* v. *Schiott*, 2 V. & B. 49; *Le Grow* v. *Cockerell*, 5 Sim. 389.

have claimed it. "There can be no two things" (said Lord Manners) (*t*), "more distinct or opposite than possession as mortgagee and possession as owner of the estate; nor can anything be more hazardous or inconvenient than the possession of a mortgagee, the manner in which he is called to account is most rigorous and severe." One consequence of a decision, that a mortgagee who obtains a foreclosure absolute is not safe against the Statute of Limitations under circumstances like those of the present case, would be to make it necessary for him (under such circumstances) to take possession while still mortgagee, or, if it were resisted, to bring ejectment for that purpose, on pain of forfeiting his title and of becoming liable, if a trustee (as the present plaintiffs are), for a loss by breach of trust of the whole value of the estate.

"The present plaintiffs had, thirteen months before the commencement of this action, obtained against the present defendant an order of foreclosure absolute, having that effect in equity which has been described. Their action was brought upon the title so obtained. Their statement of claim contains these averments: 1, "that by virtue of three orders of foreclosure made in the suit (of which the dates are stated) and by virtue of the indenture of the 24th of November, 1856, the lands and premises mentioned in the writ became and still are subject to the trusts of the indenture of settlement of the 24th of February, 1816;" and, 2, that "by virtue of the premises the plaintiffs are now seised in fee simple, and entitled to possession of the lands and premises mentioned in the writ." The plaintiffs represent, for the purpose of this action, the whole equitable title and rights of their *cestuis que trust*.

"It is not in our opinion necessary to determine how far and under what circumstances, before the Judicature Acts, a Court of law would have taken notice of the effect of such orders of foreclosure, as vesting for the first time the equitable title in the person who previously as mortgagee had the legal estate. Under sections 24 and 25 of the Judicature Act of 1873, the High Court of Justice is bound to do so, and to give full effect to the equitable right; so that (if there would previously have been any conflict on this point between law and equity) the rule of equity must now prevail. We may, however, state our agreement with what was long before said by Lord St. Leonards (*u*); which is, we think, fully applicable in principle to the present case: "A suit in this Court" (*i.e.*, the Court of Chancery) "properly instituted, will prevent time from running; and a Court of law, now that the same rule is prescribed by the statute for both Courts, should, I conceive, act upon that principle. At all events, this Court will protect its own jurisdiction; and will not permit the suitor to be evicted at law who had an equitable right to sue for the land, and had filed his bill within the limit allowed, and duly pursued his remedy."

"It is impossible, without disregarding the equitable title, to hold that the right of the plaintiffs to the land in the present case was barred by the Statute of Limitations when this action was brought. All the sections of the Statute of Limitations which especially relate to mortgages, and also the later Act, 1 Vict. c. 28, may be laid entirely out of the case; this action was not barred by any of them. The

(*t*) *Blake* v. *Foster*, 2 Ball & Beatty, 493.

(*u*) *Wrixon* v. *Vize*, 3 D. & War. 123.

Chap. XIV.

Act 1 Vict. c. 28 does not itself create a bar in any case in which it had not been already created by the Act which it explains; it only declares (in conformity, and with manifest reference, to the rule which had before prevailed in equity) that nothing in that Act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal or interest from the person entitled to the equity of redemption within twenty years before the commencement of any action or suit. The question therefore depends upon the second and third, when considered in connection with the 24th & 34th sections of 3 & 4 Wm. IV. c. 27. Time (if it ever ran under the 2nd & 3rd sections) must have begun to run either from the date of the mortgage deed (24th November, 1856), or from the day fixed for redemption on payment of the principal money secured by the deed;—not more certainly than a year afterwards. It is obvious, that the time having that commencement could only run against the mortgage title then vested in the plaintiffs. So far as that title was concerned, their proper remedy was equitable; and that remedy was duly pursued within the period limited by section 24. After the commencement of the suit, which ended in the foreclosure, it was no longer possible that the statute should run against that title. The new title by foreclosure first accrued upon and by reason of the forfeiture of the defendant's equity of redemption, within the meaning of the last clause of the 3rd section of the statute; *i.e.*, at the date of the order for foreclosure absolute. Lord St. Leonards thought that this last clause was the only part of the 3rd section applicable to mortgages (*x*): and if applicable (as he thought it) to the lapse by non-payment *ad diem* of the first right of redemption expressly reserved by the deed, it cannot be less applicable (when the party who forecloses has the legal estate) to the later and more conclusive forfeiture by which the equity of redemption is finally barred. The legal estate under such circumstances supports the beneficial title. A plaintiff who obtains a foreclosure cannot be in a worse position, because when he became in equity the owner of the land he had already a legal estate, down to that time unaccompanied by ownership. If authority were needed, these conclusions appear to be supported by that of Lord St. Leonards in the case before him, already referred to (*y*). He thought, notwithstanding the doubts expressed by Patteson, J. (*z*),—doubts which, speaking here for myself, I should have shared if the point had been open—that, although the conveyance was by way of mortgage, the right to bring an action, or make an entry, clearly fell within the 2nd section; but he also thought that a foreclosure suit was a suit 'to recover the land' within the meaning of that statute and of 1 Vict. c. 28. "The right," he said, "to file a bill of foreclosure, whether the plaintiff's mortgage be a legal or an equitable one, falls within the 24th section of the statute 3 & 4 Wm. IV. c. 27, and 1 Vict. c. 28; and the time is governed by the legal right of the party to bring an action, or, if he have not the legal estate, by the right which he would have had if his estate had been a legal instead of an equitable one." And "it cannot be said that the suit is not to recover the land, as it is already vested in him, for this expression would be strictly accurate where the mortgage is of the equitable estate;

(*x*) *Wrixon* v. *Vise*, 3 D. & War. 117. 116—120.

(*y*) *Wrixon* v. *Vise*, 3 D. & War.

(*z*) *Doe* v. *Williams*, 5 Ad. & E. 291.

and, where the mortgage is a legal one, yet the suit is in effect to recover or obtain the equity of redemption, which is, in the view of equity, an actual estate" (*a*).

"Lord St. Leonards, therefore, held, that a mortgagee, by filing a bill for foreclosure within the time limited by section 24, did all that was necessary to prevent the bar of the statute, and that when he obtained the usual order for foreclosure absolute he 'recovered the land' within the meaning of the statute. If so, how could the mortgagor be entitled, a day or a year afterwards, to refuse to give up possession on the ground that the right was barred by the statute? The 34th section says that at the determination of the period limited by the Act to any person for bringing any action or suit, all right and title of such person to the land, for the recovery whereof such action or suit might have been brought within such period, shall be extinguished. If the period limited for bringing an action for the recovery of possession of land under a legal conveyance by way of mortgage, could be held to have determined by the lapse of twenty years from the accruer of such right of action, during the pendency of a foreclosure suit commenced in due time, we see no escape from the conclusion that the right and title of the mortgagee to the land would be thenceforth extinguished; that instead of the equitable estate of the mortgagor being forfeited to the mortgagee, the whole right, title, estate, and interest of the mortgagee would be transferred to the mortgagor; and that instead of an order for foreclosure absolute being afterwards made, all further proceedings in the foreclosure suit ought immediately thereupon to be stayed.

"To state such a consequence (if it logically follows, as we think it does), is of course to disprove the premises. The defendant, who is barred by the order absolute, is estopped from denying that the right and title thereby adjudged to the plaintiffs became vested in them by virtue of that order; or, that the plaintiffs thereupon became entitled in a right distinct from any which they previously had to that possession which he, the defendant, had, down to that time, held, not by wrong, but under and by virtue of the same right and title which is so transferred. The plaintiffs are not barred by the statute, because after the institution of the Chancery suit it ceased to run against them; and by the present action they are seeking to enforce that right of possession which was for the first time given to them, indefeasibly, by the decree absolute for foreclosure in that suit."

Discontinuance of receipt of rent, what.

Among the times specified in 3 & 4 Wm. IV. c. 27 (*b*) at which the right to make an entry or distress, or bring an action to recover any land or rent, is to be deemed to have first accrued, is the following, namely:—

S. 3. "When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto,

(*a*) *Wrixon* v. *Vise*, 3 D. & War. 119, 120. (*b*) S. 3.

Chap. XIV.

have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

In order to bring a person rightfully entitled within the operation of this section, so as to divest him of his rights, there must be a 'discontinuance' of the receipt by him—*i.e.*, by not applying for payment, or omitting to enforce his remedies, with knowledge that the payment has not been made. This was decided in the following case:—

Certain lands which were subject to a fee-farm rent were, in 1812, conveyed upon a sale by the then owner to the plaintiff's predecessor in title. From 1812 down to 1872, the rent was paid by the vendor and his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to, and so received the rent, were ignorant of the conveyance of the lands to the plaintiff's predecessor in title. In 1872, the successor in title of the vendor refused to continue the payments of rent, and the defendant, as the owner of the rent, thereupon demanded payment of the rent from the plaintiff, and on her refusal to pay it, distrained upon the land for the arrears. The plaintiff thereupon brought an action in replevin, claiming that the defendant's title to the rent was barred by discontinuance of the receipt of the rent, under 3 & 4 Wm. IV. c. 27, ss. 2 & 3, on the ground that the payments of rent since 1812 not being by the terre-tenant, there had been no receipt of the rent within that Act during such period. It was held that there was no discontinuance of the receipt of the rent, and that the defendant's title was not barred (*c*).

37 & 38 Vict. c. 57.

Twelve years.

The Real Property Limitation Act, 1874 (*d*), which came into operation on the 1st January, 1879, was passed further to limit the times within which actions or suits might be brought for the recovery of land or rent, and of charges thereon. Thus, it shortens the period within which land or rent may be recovered to twelve years (*e*). It provides in respect of estates in reversion or remainder, or other future estates, that the right to recover any land or rent shall arise at the time of the same becoming an estate in possession, by the determination of any estate in respect of which the land shall have been held, or the rent shall have been received: but if the person last entitled to any particular

Future estates.

(Person entitled to the

(*c*) *Adnam* v. *The Earl of Sandwich*, L. R. 2 Q. B. D. 485; see also *Leigh* v. *Jack*, L. R. 5 Ex. D. 264.

(*d*) 37 & 38 Vict. c. 57.

(*e*) S. 1, for s. 2 of 3 & 4 Wm. IV. c. 27.

estate on which any future estate was expectant, shall not have been in possession at the time when his interest determined, no entry or distress is to be made, or action or suit brought by any one becoming entitled in possession to a future estate but within twelve years next after the time when the right to recover such land or rent shall have first accrued to the person whose interest shall have so determined, or within six years next after the estate of the person becoming entitled in possession shall have become vested in possession, whichever period is the longer; and if the right of any such person has been barred, no one afterwards claiming in respect of any subsequent estate under any deed, will, or settlement, executed or taking effect after a right to recover such land or rent shall have first accrued to the owner of the particular estate whose interest has determined, shall recover such land or rent (*f*).

(particular estate out of possession.)

Disability.

The Act further provides, that where the right to recover land or rent shall have accrued to a person under any of the disabilities of infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then a further period is to be allowed of six years after the disability shall have ceased, or the death of such person, whichever event shall first happen (*g*); but no time is to be allowed as formerly for absence beyond the seas (*h*); and the utmost period within which entry, distress, action, or suit may be made or brought, in any case is limited to thirty years next after the time at which the right shall have first accrued (*i*). Nor is any further time to be allowed for a succession of disabilities (*k*).

Tenant in tail.

Also the Act provides that in case of possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twelve years (instead of twenty years), after the period at which the assurance, if then executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have barred them (*l*). Thus, suppose A., tenant in tail, in the lifetime of B., tenant for life and so protector of the settlement, conveyed by deed enrolled

(*f*) S. 2, for s. 5 of 3 & 4 Wm. IV. c. 27.

(*g*) S. 3, for s. 16 of 3 & 4 Wm. IV. c. 27.

(*h*) S. 4.

(*i*) S. 5, for s. 17 of 3 & 4 Wm. IV. c. 27.

(*k*) 3 & 4 Wm. IV. c. 27, s. 18, amended by 37 & 38 Vict. c. 57, s. 9.

(*l*) S. 6, for s. 23 of 3 & 4 Wm. IV. c. 27.

Chap. XIV.

to C. in fee in 1860, who on the death of B. in 1868 took possession, and A. died in 1875, leaving no issue; D., entitled in remainder, could not sue C. for possession in 1882, because more than twelve years had elapsed since the commencement of the time at which A.'s assurance would have barred D. and all remaindermen, namely, the death of B. The earlier statute had already provided (*m*) that where a tenant in tail is barred, remaindermen, whom he might have barred, shall not recover, and that possession against a tenant in tail shall run on after his death against the remaindermen whom he might have barred. These provisions of the earlier Act are thus explained by Kindersley, V.C. (*n*)—

> "The intention and operation of these sections were to put remaindermen, whose estates might be barred by the tenant in tail, in the same position as if they claimed under tenants in tail; that is, the act of the tenant in tail in allowing any portion of the twenty (*o*) years to run without making an entry or bringing an action, to the extent of the period allowed to elapse, binds the remainderman."

Mortgagee in possession.

Also by the Act of 1874, the mortgagor is limited to twelve years (instead of twenty years), in which to redeem, from the time when the mortgagee took possession, or from the last written acknowledgment of his (the mortgagor's) title or right to redeem (*p*); and supposing the mortgagee to have taken possession of part of the land, the statute will run against the mortgagor as to that, though he have retained possession of the remainder (*q*); also the time within which an action for redemption may be brought by the mortgagor is not to be extended by reason of any disability (*r*).

Money charged upon land and legacies.

Similarly, the Act provides that money secured by mortgage or otherwise charged upon land or rent and legacies are to be deemed satisfied at the end of twelve years (instead of twenty years), if no interest be paid nor written acknowledgment of the right thereto given (*s*). It has recently been decided that such limitation of twelve years applies to the personal remedy on the covenant in a

---

(*m*) 3 & 4 Wm. IV. c. 27; ss. 21 & 22, which remain in force, see 37 & 38 Vict. c. 57, s. 9.

(*n*) *Goodall* v. *Skerratt*, 3 Dr. 220.

(*o*) Now twelve.

(*p*) S. 7, for s. 28 of 3 & 4 Wm. IV. c. 27.

(*q*) *Kinsman* v. *Rouse*, L. R. 17 Ch. D. 104.

(*r*) *Id.*, and *Foster* v. *Patterson*, L. R. 17 Ch. D. 132.

(*s*) S. 8, for s. 40 of 3 & 4 Wm. IV. c. 27.

mortgage deed as well as to the remedy against the land (*ss*); and similarly to the remedy on the bond where the mortgage debt is secured by a collateral bond (*t*).

Money and legacies charged upon land secured by express trust.

The Act further provides that, after 1st January, 1879, the time for recovering any sum of money or legacy charged upon land or rent, or any arrears of rent or interest, in respect of the same, or any damage in respect of such arrears, is not to be enlarged by reason of the sum of money or legacy being secured by an express trust (*tt*). In the earlier statute it had been enacted,

Land or rent vested in trustee on express trust.

in accordance with the general principles of equity (*u*), that, in case of any land or rent being vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover the same should be deemed to have first accrued at the time of conveyance to a purchaser for valuable consideration, and then only against such purchaser and any person claiming through him (*x*). Speaking of the section in the earlier Act, Kindersley, V.C., said:—

> "The section, it will be observed, is confined to express trusts, that is, trusts expressly declared by a deed, or a will, or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument; and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute. But, if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be the right owner" (*y*).

Cestui que trust against trustee (Jud. Act, 1873).

The law as regards the claim of a *cestui que trust* against his trustee is, in accordance with the previous rule in equity (*z*), declared by the Judicature Act, 1873 (*a*), by which it is enacted that:—

S. 25, § 2. "No claim of a *cestui que trust* against his trustee for

(*ss*) *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511.

(*t*) *Fearnside* v. *Flint*, *ib.* 579. *Ante*, p. 179.

(*u*) S. 10.

(*u*) See Darby & Bosanquet, 182.

(*x*) 3 & 4 Wm. IV. c. 27, s. 25.

(*y*) *Petre* v. *Petre*, 1 Drewry, 393. And see *Sands* to *Thompson*, L. R. 22 Ch. D. 614: *quære—per* Fry, J., must the trust be expressed in writing?

(*z*) See 2 Spence's Equity, p. 48.

(*a*) 36 & 37 Vict. c. 66, s. 25, § 2.

Chap. XIV.

any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations" (*b*).

Concealed fraud (3 & 4 Wm. IV. c. 27; 37 & 38 Vict. c. 57).

It has always been a principle of equity to give relief against fraud. Accordingly, to prevent time running in such cases while fraud remains concealed, it was enacted by the statute of Wm. IV. (*c*), as follows:—

> S. 26. "In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed."

This and the other provisions of 3 & 4 Wm. IV. c. 27, subsequently mentioned in this chapter, remain in full force, and are to be construed together with the Real Property Limitation Act, 1874 (*d*). Said Kindersley, V.C.:—

> "'Concealed fraud' does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold" (*e*).

The true meaning of the whole section, both of the first branch containing the substantive enactment, and of the latter or saving clause, was much discussed in a case before the Lords Justices (*f*). The facts were as follows (*g*):—

The plaintiff's case was that under a family settlement certain estates stood limited to the use of his father for life, with remainder to the

---

(*b*) See the note on this enactment by Mr. F. O. Haynes, in his edition of the Judicature Act, 1873, suggesting a doubt whether it does not narrow the rule in equity previously obtaining.

(*c*) 3 & 4 Wm. IV. c. 27.

(*d*) 37 & 38 Vict. c. 57, s. 9.

(*e*) *Petre* v. *Petre*, 1 Drewry, 397.

(*f*) *Vane* v. *Vane*, L. R. 8 Ch. App. 383.

(*g*) Thus stated by James, L.J., p. 395.

eldest son in tail, that he was such eldest son, and that on the death of his father the estates became in law vested in him, but that he was deprived of them by the following fraudulent contrivance:—

His father, according to his story, had lived with his mother as his mistress before their marriage, but she being with child, he determined to marry her and intended to marry her before the birth of such child. Before, however, the marriage could be celebrated, she was confined. The marriage took place some short time afterwards (9th March, 1797), and it was then agreed between the husband and the wife to prevent the child suffering from the untoward accident of its premature birth by falsifying the date of such birth, and representing it as having taken place after the marriage. This was done, and that child was accordingly produced, represented, and treated as being the legitimate son, the eldest son, and the heir in tail of the settled property. Some years afterwards the plaintiff himself was born (10th May, 1807), being, as he says, the real eldest son and heir in tail, but brought up as if he were only a younger child, and kept in ignorance of the real facts as to his position and right. When the supposititious child attained his majority, he was informed of the fact that he was illegitimate, and with this knowledge the father and himself went through the form of suffering a common recovery in the character of tenant for life, and tenant in tail in remainder to such uses as they should jointly appoint. A joint appointment was made, and afterwards, under a marriage settlement, the property was expressed to be limited to uses in favor of the demurring defendants, the widow and eldest son of the supposititious heir; the terms of such settlement, it was alleged, were negotiated by the father of the widow with full knowledge of the illegitimacy. The plaintiff further alleged that until a few years before the suit he was wholly ignorant of the deception which had been practised, and he had now filed his bill, contending that he is entitled to the assistance of a Court of Equity to be placed in possession of the estates, as estates of which he has been deprived by a concealed fraud.

James, L.J., delivering the judgment of the Court, said:—

"The real question is, as to the true meaning of the 26th section of the Statute of Limitations. On this two contentions were raised. First, that the plaintiff had not alleged a sufficient title under the positive enactment in that section. Secondly, that the defendants were within the protection of the proviso in favor of purchasers. As to the first, there does not seem to us to be any real doubt or question. It is difficult to conceive what would be a concealed fraud, if what is here alleged is not, namely, that a person is induced, by a deception practised on him from his earliest knowledge, to believe that he was only a younger when he was the eldest son; or how a person could be more effectually deprived by fraud of his estate than by his being designedly, by the persistent falsehood and deceit of those about him, kept in ignorance of his birthright, and so prevented from claiming it. The statute, indeed, says that a claimant must proceed within twenty years after he discovered, or might with reasonable diligence have discovered, the fraud. The plaintiff alleges in so many words that he never did know or suspect, until the recent time mentioned by him, anything of the alleged fraud; and that

Chap. XIV.

we must take to be true, unless we are enabled judicially to conclude from other statements of his in the bill that that allegation is false, or that he might with reasonable diligence have discovered the fraud. We are unable to find in the bill any such statement or anything to show any want of reasonable diligence on his part in ascertaining the truth.

"That brings us to the remaining and real point, whether the bill shows that the defendants are protected by the proviso. One matter relating to this was not argued before us, which we, however, think it right not to pass wholly unnoticed—viz.: we desire not to express any opinion as to whether the defence of *bonâ fide* purchaser for valuable consideration, without knowledge of or reason to believe the fraud alleged, can be raised by demurrer, or otherwise than by a plea verified by the oath of the defendant. The case was argued before us, however, so as to raise the real substantial question whether the proviso means the actual personal knowledge of the purchaser, or whether under it the actual knowledge of the agent is to be deemed and taken to be the knowledge of the purchaser.

"It was contended by the Solicitor-General that the only person protected was a *bonâ fide* purchaser, and that we ought, on the authority of Lord Hardwicke, to hold that a person is not a *bonâ fide* purchaser whose agent was affected with notice of that which should have prevented his purchasing. In this proviso, however, we think that the words '*bonâ fide*' were introduced altogether for a different purpose, and with a different meaning—that it was meant that the purchaser should be really a purchaser, and not merely a donee taking a gift under the form of a purchase. For example, a person might take an assignment of a leasehold in consideration of covenants to pay the rent and perform all the covenants—might take a conveyance of a mortgaged estate in consideration of his paying off the mortgage. These might be *bonâ fide* purchasers, or they might, according to the facts, be in truth and substance volunteers receiving a gift of a valuable chattel real or a valuable estate incumbered. It would be easy to suggest many other circumstances by which it might be shown that an apparent purchaser had not entered into the transaction honestly and substantially as a purchaser, but in some other character, or for some indirect purpose. And we conceive that it was with reference to that class of cases the words '*bonâ fide*' were introduced here, and that they were not meant to include and cover all, and more than all, that is afterwards expressed in the remainder of the proviso. What, then, is the legal meaning and effect of that which is so afterwards expressed? At the time this statute was passed, it had undoubtedly been held by the highest authority that the actual knowledge of the agent through whom an estate is acquired is in this Court equivalent to the actual personal knowledge of the principal. This is also in accordance with the invariable course of decision at common law in regard to purchases of chattels. No one dealing through an agent is ever permitted to allege himself ignorant of that which is actually communicated to the agent in the course of the transaction. The agent in the matter, and in the course of the transaction acting within the limits of his agency, is the *alter ego* of the principal.

"It appears to us beyond all question that, as the law of this Court stood when the statute was passed, the knowledge of the purchaser's

agent acquired in the course of the transaction was for all purposes treated as the knowledge of the principal. It is also, we conceive, beyond question that in every other case, except under this section, this Court would treat the knowledge of the purchaser's agent as the knowledge of the purchaser. Was it then meant to make such a material alteration of the law? It is said in support of that (and not without force) that the words well known in this Court, 'purchaser for valuable consideration without notice,' were designedly not used, and that the words 'who had not participated in the fraud, and did not know, and had no reason to believe,' were designedly introduced so that only those purchasers should be affected who had actual knowledge, and who were in truth making themselves morally accomplices in the fraud, in fact receivers of stolen goods.

"But we think that what the Legislature really meant to do was to exclude that constructive notice which had certainly been carried to a very startling extent in many instances, and that it did not mean to subvert, in respect of one small portion of the law of this Court, the well-settled principles and rules on which all the Courts have acted in respect of the relation of principal and agent, and in respect of the extent to which the knowledge of the latter is deemed to be the knowledge of the former. The Courts had, in fact, held, almost in so many words, that what the agent knows, the principal knows; that the knowledge of the agent was sufficient to create *mala fides* in the principal; and we think it, therefore, reasonable to hold that the Legislature used the words in the same sense, and that when they said 'who did not know or had not reason to believe,' they meant 'who did not know or had not reason to believe, either by himself or by some agent whose knowledge or reason to believe is by settled law deemed and taken to be his.' We think it would lead to very startling consequences if any other interpretation were put on the clause. It is obvious that if actual personal knowledge were required, every corporation or joint-stock company might acquire a good title to property, although its officers and solicitors were perfectly conversant with the grossest fraud perpetrated by the vendor; and in fact any person might deal with impunity in the purchase of what is in substance stolen property, provided he takes care to leave the whole dealing from first to last in the hands of his agent.

"We have arrived, therefore, at the conclusion that the averment that the father, as the agent of and on behalf of his daughter, negotiated the marriage settlement with full knowledge that her intended husband was illegitimate, and had no interest in the devised estates, is a sufficient averment to preclude the daughter from setting up the bar of purchase for valuable consideration under the 26th section of the Act, and that the son, who only claims through the same settlements, is in the same position, and is equally affected with knowledge through the knowledge of his mother's father and agent" (*h*).

(*h*) See also *Chetham* v. *Hoare*, L. R. 9 Eq. 571; where the allegation of a concealed fraud, discovered 125 years afterwards, failed, on the ground of absence of that reasonable diligence by which the fraud might have been discovered at an earlier period.

Chap. XIV.

Acquiescence.

Jurisdiction of equity. (3 & 4 Wm. IV. c. 27: 37 & 38 Vict. c. 57.)

The jurisdiction of equity to hold a suit barred, notwithstanding that the period of limitation has not elapsed, is thus saved by the Statute of Limitations (*i*):—

> S. 27. "Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of Acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act" (*k*).

As to the doctrine of Acquiescence, Mr. Dart (*l*), says:—

> "Mere lapse of time, except where it is a statutory or positive bar to relief, is only evidence of acquiescence: but a *cestui que trust* wishing to impeach a sale must do so within a reasonable time; which, as a matter of fact, is generally less than the time allowed by the Statute of Limitations: though independently of statutory limitation, no positive limit of time can be imposed, and each case must be governed by its own circumstances. A delay of eighteen years has been held to be an implied confirmation of the transaction: ten years have been allowed in the case of an individual; and twelve in the case of creditors: but the general tendency of modern decisions and of recent legislation is to increasingly discourage stale demands; and where there are other circumstances, showing acquiescence, beyond the mere lapse of time, a short delay will be a sufficient bar to relief. A longer time, however, is allowed to a class of persons, *e.g.* creditors, than would be allowed to an individual."

The difference between 'acquiescence' and simple '*laches*' has been thus well expressed by Lord Wensleydale:—

> "Where there is a Statute of Limitations, the objection of simple *laches* does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than *laches*. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period which the law permits him to delay without losing his right, I conceive cannot be any equitable bar" (*m*).

Title extinguished. (3 & 4 Wm. IV. c. 27: 37 & 38 Vict. c. 57.)

Unlike the Statute of Limitations of James I., as regards personal property, debts, and liabilities, which merely destroys the remedy, the Statute of Wm. IV. (*n*), as regards real property where the title is barred by the lapse of time, destroys it and

---

(*i*) 3 & 4 Wm. IV. c. 27.

(*k*) This section remains in force and is to be read with 37 & 38 Vict. c. 57; see s. 9.

(*l*) V. & P. vol. i. p. 48.

(*m*) *Per* Lord Wensleydale, *Archbold* v. *Scully*, 9 H. of L. 383. See also *In re Baker*, L. R. 20 Ch. D. 230.

(*n*) 3 & 4 Wm. IV. c. 27, s. 34.

extinguishes the right of the party out of possession. It enacted as follows:— Chap. XIV.

> S. 34. "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished" (*o*).

When a title has once been extinguished by the statute, no acknowledgment or ~~receipt~~ payment of rent by the person who has by lapse of time acquired under the statute as good a title as if a conveyance had been made to him, can restore the old title (*p*). And where a mortgagor in possession has paid off the debt, but no reconveyance has been executed, thirteen years after such payment the legal estate in the mortgagee is extinguished (*q*).

(*o*) This section remains in force, and is to be read with 37 & 38 Vict. c. 57; see s. 9.

(*p*) *In re Alison*, L. R. 11 Ch. D. 284; and *Sanders* v. *Sanders*, L. R. 19 Ch. D. 373.

(*q*) *Sands* to *Thompson*, L. R. 22 Ch. D. 614.

B. S. pleading the Statute
see per L. Cairns in Dawkins
v. Penrhyn 4 App. Ca. 57.

ACTS, &c., IN APPENDIX.

REAL PROPERTY LIMITATION, 1874.
[37 & 38 Vict. c. 57.]

REAL PROPERTY VENDORS AND PURCHASERS, 1874.
[37 & 38 Vict. c. 78.]

LAND TITLES AND TRANSFER, 1875.
[38 & 39 Vict. c. 87.]

SETTLED ESTATES ACT, 1877.
[40 & 41 Vict. c. 18.]

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.
[44 & 45 Vict. c. 41.]

CONVEYANCING ACT, 1882.
[45 & 46 Vict. c. 39.]

SETTLED LAND ACT, 1882.
[45 & 46 Vict. c. 38.]

MARRIED WOMEN'S PROPERTY ACT, 1882.
[45 & 46 Vict. c. 75.]

RULES OF SUPREME COURT, 1882.

ORDER AS TO COURT FEES.

APPENDIX.

REAL PROPERTY LIMITATION.

37 & 38 Vict. c. 57.

[37 & 38 VICT. CH. 57.]

ARRANGEMENT OF CLAUSES.

Clauses.

1. No land or rent to be recovered but within twelve years after the right of action accrued.
2. Provision for case of future estates. Time limited to six years when person entitled to the particular estate out of possession, &c.
3. In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.
4. No time to be allowed for absence beyond seas.
5. Thirty years utmost allowance for disabilities.
6. In case of possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them.
7. Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.
8. Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.
9. Act to be read with 3 & 4 W. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act. 7 W. 4 & 1 Vict. c. 28 to be read with this Act.
10. Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.
11. Short title.
12. Commencement of Act.

An Act for the further Limitation of Actions and Suits relating to Real Property. [7th August, 1874.]

WHEREAS it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

37 & 38 Vict. c. 57.

No land or rent to be recovered but within 12 years after the right of action accrued.

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

See *Sands* to *Thompson*, L. R. 22 Ch. D. 614.

Provision for case of future estates.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

Time limited to six years when person entitled to the particular estate out of possession, &c.

In cases of infancy, coverture, or

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent,

shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) herein-before limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

No time to be allowed for absence beyond seas.

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

Thirty years utmost allowance for disabilities.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of 12 years after that period, at which the assurance, if then executed, would have barred them.

37 & 38 Vict. c. 57.

Mortgagor to be barred at end of 12 years from the time when the mortgagee took possession or from the last written acknowledgment.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

See, as to time not being extended by disability of the mortgagor, *Forster* v. *Patterson* L. R. 17 Ch. D. 132; *Kinsman* v. *Rouse*, *ib.* 104.

Money charged upon land and legacies to be deemed satisfied at the end of

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to

receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

12 years if no interest paid nor acknowledgment given in writing in the meantime.

See *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511, and *Fearnside* v. *Flint*, *ib.* 579.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of His late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of Her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

Act to be read with 3 & 4 W. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

7 W. 4, & 1 Vict. c. 28, to be read with this Act.

10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

11. This Act may be cited as the "Real Property Limitation Act, 1874."

Short title.

12. This Act shall commence and come into operation on the first day of January one thousand eight hundred and seventy-nine.

Commencement of Act.

37 & 38 Vict. c. 78.

REAL PROPERTY VENDORS AND PURCHASERS.

[37 & 38 VICT. CH. 78.]

ARRANGEMENT OF CLAUSES.

Clauses.
1. Forty years substituted for sixty years, as the root of title.
2. Rules for regulating obligations and rights of vendor and purchaser.
3. Trustees may sell, &c., notwithstanding rules.
4. Legal personal representative may convey legal estate of mortgaged property.
5. Bare legal estate in fee simple to vest in executor or administrator.
6. Married woman who as a bare trustee may convey, &c.
7. Protection and priority by legal estates and tacking not to be allowed.
8. Non-registration of will in Middlesex, &c., cured in certain cases.
9. Vendor or purchaser may obtain decision of Judge in Chambers as to requisitions or objections, or compensation, &c.
10. Extent of Act.

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land. [7th August 1874.]

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

Rules for regulating obligations and rights of vendor and purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

See Conveyancing and Law of Property Act, 1881, s. 3 (1) and s. 13; and Conveyancing Act, 1882, s. 4; and, as to rule that a lessee has constructive notice of his lessor's title, *Patman* v. *Harland*, L. R. 17 Ch. D. 353.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

See, as to effect of recital in deed twenty years old, *Bolton* v. *London School Board*, L. R. 17 Ch. D. 766, *sed quære*.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

Trustees may sell, &c., notwithstanding rules.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.

Legal personal representative may convey legal estate of mortgaged property.

4. The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.

See Conveyancing Act, 1881, s. 30.

Bare legal estate in fee simple to vest in executor or administrator.

5. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

Repealed. *See* Land Transfer Act, 1875, s. 48 ; and Conveyancing Act, 1881, ss. 30, 73.

Married woman who is a bare trustee may convey, &c.

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.

Protection and priority by legal estates and tacking not to be allowed.

7. After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land ; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for

37 & 38 Vict. c. 78.

valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.

Repealed. *See* Land Transfer Act, 1875, s. 129; and Conveyancing Act, 1881, s. 73.

Non-registration of will in Middlesex, &c., cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

See, as to what evidence is admissible, *In re Burroughs, &c.*, L. R. 5 Ch. D. 601; as to time for appeal, *In re Blyth & Young*, L. R. 13 Ch. D. 416.

Extent of Act.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

LAND TITLES AND TRANSFER.

38 & 39 Vict. c. 87.

[38 & 39 VICT. CH. 87.]

ARRANGEMENT OF CLAUSES.

Clauses.

PRELIMINARY.

1. Short title.
2. Application of Act.
3. Commencement of Act.
4. Construction of terms in Act.

PART I.

ENTRY OF LAND ON REGISTER OF TITLE.

(1.) *Freehold Land.*

5. Application for registration with an absolute title or with a possessory title only.
6. Evidence of title required on application.
7. Estate of first registered proprietor with absolute title.
8. Estate of first registered proprietor with possessory title.
9. A qualified title may be registered in certain cases.
10. Land certificate given on registration.

(2.) *Leasehold Land.*

11. Application for registration with or without a declaration of title of lessor to grant lease.
12. Evidence of title required on application.
13. Estate of first registered proprietor of leasehold land with a declaration of absolute title of lessor to grant lease.
14. Estate of first registered proprietor of leasehold land without a declaration of title of lessor to grant lease.
15. Lessor may be declared to have a qualified title to grant lease in certain cases.
16. Office lease given on registration.

FREEHOLD AND LEASEHOLD LAND.

17. Regulations as to examination of title by registrar.
18. Liability of registered land to easements and certain other rights.
19. Discharge of incumbrance.
20. Determination of lease.
21. No acquisition of title by adverse possession.

PART II.

REGISTERED DEALINGS WITH REGISTERED LAND.

Mortgage of Registered Land.

22. Creation of charges and delivery of certificate of charge.
23. Implied covenant to pay charges.
24. Implied covenant in case of leaseholds to pay rent, &c., and indemnify proprietor of charge.

38 & 39 Vict. c. 87.

Clauses.

25. Entry by proprietor of charge.
26. Foreclosure by proprietor of charge.
27. Remedy of proprietor of charge with a power of sale.
28. Priority and discharge of registered charges.

Transfer of Freehold Land.

29. Transfer of freehold land and delivery of land certificate.
30. Estate of transferee for valuable consideration of freehold land with absolute title.
31. Estate of transferee for valuable consideration of freehold land with qualified title.
32. Estate of transferee for valuable consideration of freehold land with possessory title.
33. Estate of voluntary transferee of freehold land.

Transfer of Leasehold Land.

34. Transfer of leasehold land and delivery of office lease.
35. Estate of transferee for valuable consideration of leasehold land with a declaration of absolute title of lessor.
36. Estate of transferee for valuable consideration of leasehold land with a declaration of qualified absolute title of lessor.
37. Estate of transferee for valuable consideration of leasehold land without a declaration of title of lessor.
38. Estate of voluntary transferee of leasehold land.
39. Implied covenants on transfer of leasehold estates.

Transfer of Charges.

40. Transfer of charges on register.

Transmission of Land and Charges.

41. Transmission on death of freehold land.
42. Transmission on death of leasehold land or of charge.
43. Transmission on bankruptcy of land or charge.
44. Effect of marriage of female proprietor of freehold land.
45. Effect of marriage of female proprietor of leasehold land or charge.
46. Nature of title of registered fiduciary proprietor.
47. Evidence of transmission of registered proprietorship.
48. Repeal and re-enactment (with amendments) of 37 & 38 Vict. c. 78, s. 5; not to apply to registered lands.

PART III.

UNREGISTERED DEALINGS WITH REGISTERED LAND.

49. Effect of unregistered dispositions.

Notice of Leases.

50. Lessee may apply for registration of notice of lease.
51. Manner of registering notices of leases.

Notice of Estates in Dower or by the Curtesy.

52. Registration of notices of estates in dower or by the curtesy.

Cautions against registered Dealings.

53. Caution against registered dealings how to be lodged.
54. Cautioner entitled to notice of proposed registered dealings.
55. Registered dealings delayed on bond being given.
56. Compensation for improper lodging of caution.

Inhibition against registered Dealings without Order of Court.

Clauses.

57. Power of Court or registrar to inhibit registered dealings.

Power of Registered Proprietor to impose Restrictions.

58. Power to place restrictions on register.
59. Registrar to enter restrictions in register.

PART IV.

PROVISIONS SUPPLEMENTAL TO FOREGOING PARTS OF ACT.

Caution against Entry of Land on Register.

60. Caution against registration of land.
61. Caution to be supported by affidavit.
62. Cautioner entitled to notice of proposed registration of land.
63. Compensation for improper lodging of caution.
64. Saving as to effect of caution.

Crown Lands.

65. Facilities for registration of Crown lands.
66. Registry of land below high-water mark.

As to Proceedings on and before Registration.

67. Registration of lands of different tenures.
68. Trustees may sell by medium of registry.
69. Registration of part owners.
70. Instruments and facts affecting the title to be disclosed on registrations.
71. Production of deeds.
72. Deeds to be marked with notice of registration.
73. Costs of application for registry.

Doubtful Questions arising on Title.

74. Registrar may state case for court of law, or direct issue.
75. Opinion of Court or decision of jury, how far conclusive.
76. Intervention of Court in case of incapacitated persons.
77. Power of Court to bind interests of incapacitated persons.

As to Land Certificates, Office Copies of Leases, and Certificates of Charge.

78. Loss of land certificate, or certificate of charge, or office copy of lease.
79. Renewal of land certificate, or certificate of charge, or office copy of lease.
80. Land certificate, certificate of charge, and office copy of lease to be evidence.
81. Effect of deposit of land certificate.

Special Hereditaments.

82. Registry of advowsons and other special hereditaments.

General Provisions.

83. Enactments as to registration.
84. Annexation of conditions to registered land.
85. Registered lands to be within the Trustee Act, 1850.
86. Indemnity of registrar.

As to Married Women.

87. Provision as to married women.

As to Infants and Lunatics.

88. Provision as to other persons under disability.

38 & 39 Vict. c. 87.

As to Notices.

Clauses.
89. Address of persons on register.
90. Service of notices.
91. Return of notices by post office.
92. Purchasers not affected by omission to send notices.

Specific Performance.

93. Power of Court in suit for specific performance.
94. Costs in suit for specific performance.

Rectification of the Register.

95. Establishment of adverse title to land.
96. Register to be rectified under order of Court.
97. Registrar to obey orders of Court.

As to Fraud.

98. Fraudulent dispositions.
99. Suppression of deeds and evidence.
100. Certain fraudulent acts declared to be misdemeanors.
101. False declarations.
102. Saving of civil remedy.
103. Saving of obligation to make discovery.

Inspection of Register.

104. Inspection of documents.

Saving Clause.

105. Saving clause as to escheat.

PART V.

ADMINISTRATION OF LAW AND MISCELLANEOUS.

(1.) *Office of Land Registry.*

106. Office of land registry, and appointment and payment of officers.
107. Seal of office of land registry.
108. Registrar to frame and promulgate forms.
109. Power of registrar to summon witnesses.
110. Non-attendance or refusal to answer questions.
111. Power of Lord Chancellor to make general rules.
112. Principles on which fees determined.
113. Mode of taking fees.

Description and Powers of the Court.

114. "The Court" to mean, according to circumstances, Court of Chancery and County Court.
115. Lord Chancellor may assign duties as to registry to particular judges.
116. Appeal from County Court.
117. Appeal from Court of Chancery.

As to District Registries.

118. Power to form district registries by general orders.
119. Qualification of the district and assistant district registrar.
120. Seal for district registry.
121. Powers of district registrar, and appeals from him.
122. Application of general orders, &c., to districts.

(2.) *Temporary Provisions.*

123. Transfer of existing staff to new registry office.
124. Transfer of books and papers.

Clauses. 38 & 39 Vict. c. 87.
125. Registration under the Act of 1862 to cease after the commencement of this Act.
126. Possible re-registry of estates already registered under the Act of 1862.

Local Registries.

127. Land registered under Act to be exempted from registry of deeds.
128. Compensation to officers of local registries of deeds.

Repeal.

129. Repeal of 37 & 38 Vict. c. 78, s. 7.

An Act to simplify Titles and facilitate the Transfer of Land in England. [13th August 1875.]

WHEREAS it is expedient to make further provision for the simplification of the title to land, and for facilitating the transfer of land, in England:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PRELIMINARY.

Short title. 1. This Act may be cited as The Land Transfer Act, 1875.

Application of Act. 2. This Act shall not apply to Scotland or Ireland, and land shall not be registered under this Act unless it is of freehold tenure or is leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure; but for the purposes of this Act customary freehold, in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchase from the customary tenant, shall not be deemed to be land of freehold tenure.

Commencement of Act. 3. This Act shall come into operation on the 1st day of January 1876, which day is in this Act referred to as the commencement of this Act; but any orders or rules, and any appointment to any office, may be made under this Act at any time after the passing thereof, but shall not take effect until the commencement of this Act.

Construction of terms in Act. 4. In this Act, unless there is something inconsistent in the context,—

"Person" includes a corporation and any body of persons unincorporate:

"Registrar," "court," and "general rules," mean such "registrar," "court," and "general rules," as are in this Act respectively in that behalf mentioned:

"Prescribed" means prescribed by any general rules made in pursuance of this Act:

"The Court of Chancery," and "Court of Appeal in Chancery," and

38 & 39 Vict. c. 87.

"Her Majesty's Superior Courts," include any courts in which the powers of the Courts so referred to by name, may be for the time being vested:

"The Land Registry Act, 1862," means the Act passed in the session held in the twenty-fifth and twenty-sixth years of the reign of Her present Majesty, chapter fifty-three, intituled "An Act to facilitate the proof of title to and the conveyance of real estates."

The definition of land contained in the Act of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter twenty-one, intituled "An Act for shortening the language used in Acts of Parliament," shall not apply to this Act.

PART I.

Entry of Land on Register of Title.

(1.) *Freehold Land.*

Application for registration with an absolute title, or with a possessory title only.

5. A land registry shall be established, and on and after the commencement of this Act the following persons; (that is to say,)

(1.) Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether subject or not to incumbrances; and

(2.) Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether subject or not to incumbrances; and

(3.) Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, whether subject or not to incumbrances,

may apply to the registrar under this Act to be registered, or to have registered in his stead any nominee or nominees not exceeding the prescribed number, as proprietor or proprietors of such freehold land with an absolute title or with a possessory title only: Provided, that in the case of land contracted to be bought, the vendor consents to the application.

Evidence of title required on application.

6. Where an absolute title is required the applicant or his nominee shall not be registered as proprietor of the fee simple until and unless the title is approved by the registrar.

Where a possessory title only is required the applicant or his nominee may be registered as proprietor of the fee simple on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed.

Estate of first registered proprietor with absolute title.

7. The first registration of any person as proprietor of freehold land, (in this Act referred to as first registered proprietor,) with an absolute title, shall vest in the person so registered an estate in fee simple in such

land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows :

(1.) To the incumbrances, if any, entered on the register ; and

(2.) Unless, under the provisions of this Act, the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances ; and

(3.) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.

Estate of first registered proprietor with possessory title.

8. The registration of any person as first registered proprietor of freehold land with a possessory title only shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor ; but, save as aforesaid, shall have the same effect as registration of a person with an absolute title.

A qualified title may be registered in certain cases.

9. Where an absolute title is required, and on the examination of the title it appears to the registrar that the title can be established only for a limited period, or subject to certain reservations, the registrar may, on the application of the party applying to be registered, by an entry made in the register, except from the effect of registration any estate, right, or interest arising before a specified date, or arising under a specified instrument or otherwise particularly described in the register, and a title registered subject to such excepted estate, right, or interest shall be called a qualified title, and the registration of a person as first registered proprietor of land with a qualified title shall have the same effect as the registration of such person with an absolute title, save that registration with a qualified title shall not affect or prejudice the enforcement of any estate, right, or interest appearing by the register to be excepted.

Land certificate given on registration.

10. On the entry of the name of the first registered proprietor of freehold land on the register, the registrar shall, if required by such proprietor, deliver to him a certificate, in this Act called a land certificate, in the prescribed form ; the certificate shall state whether the title of the proprietor therein mentioned is absolute, qualified, or possessory.

(2.) *Leasehold Land.*

Application for registration with or without a declaration of title of lessor to grant lease.

11. A separate register shall be kept of leasehold land, and on and after the commencement of this Act any of the following persons ; that is to say,

(1.) Any person who has contracted to buy for his own benefit leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than

38 & 39 Vict. c. 87

twenty-one are unexpired, whether subject or not to incumbrances ; and

(2.) Any person entitled for his own benefit, at law or in equity, to leasehold land held under any such lease as is described in this section, whether subject or not to incumbrances ; and

(3.) Any person capable of disposing for his own benefit by way of sale of leasehold land held under any such lease as is described in this section, whether subject or not to incumbrances ;

may apply to the registrar to be registered, or to have registered in his stead any nominee or nominees not exceeding the prescribed number, as proprietor or proprietors of such leasehold land, with the addition where the lease under which the land is held is derived immediately out of freehold land, and the applicant is able to submit for examination the title of the lessor, of a declaration of the title of the lessor to grant the lease under which the land is held :

Provided,—

That in the case of leasehold land contracted to be bought, the vendor consents to the application.

Every applicant for registration of leasehold land shall deposit with the registrar the lease of the land in respect of which the application is made, or if such lease is proved to the satisfaction of the registrar to be lost a copy of such lease or of a counterpart thereof, verified to the satisfaction of the registrar ; and such lease or attested copy is in this Act referred to as the registered lease.

Leasehold land held under a lease containing an absolute prohibition against alienation, shall not be registered in pursuance of this Act ; and leasehold land held under a lease containing a prohibition against alienation without the license of some other person, shall not be registered under this Act until and unless provision is made in the prescribed manner for preventing alienation without such license by entry on the register of a restriction to that effect, or otherwise.

Evidence of title required on application.

12. An applicant or his nominee shall not be registered as proprietor of leasehold land, until and unless the title to such land is approved by the registrar ; and further, if he apply to be registered as proprietor of leasehold land with a declaration of the title of the lessor to grant the lease under which the land is held, until and unless the lessor, after an examination of his title by the registrar, is declared to have had an absolute or qualified title to grant the lease under which the land is held.

Estate of first registered proprietor of leasehold land with a declaration of absolute

13. The registration under this Act of any person as first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held shall be deemed to vest in such person the possession of the land comprised in the registered lease relating to such land for all the leasehold estate

therein described, with all implied or expressed rights, privileges, and appurtenances attached to such estate, but subject as follows :

(1.) To all implied and express covenants, obligations, and liabilities incident to such leasehold estate ; and

title of lessor to grant lease.

(2.) To the incumbrances (if any) entered on the register ; and

(3.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate and are by this Act declared not to be incumbrances in the case of registered freehold land ; and

(4.) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.

Estate of first registered proprietor of leasehold land without a declaration of title of lessor to grant lease.

14. The registration of any person under this Act as first registered proprietor of leasehold land without a declaration of the title of the lessor shall not affect or prejudice the enforcement of any estate, right, or interest affecting or in derogation of the title of the lessor to grant the lease under which the land is held ; but, save as aforesaid, shall have the same effect as the registration of any person under this Act as first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held.

Lessor may be declared to have a qualified title to grant lease in certain cases.

15. Where an absolute title is required, and on the examination of the title of any lessor by the registrar it appears to him that the title of such lessor to grant the lease under which the land is held can be established only for a limited period or subject to certain reservations, the registrar may, by an entry made in the register, except from the effect of registration any estate, right, or interest arising before a specified date or arising under a specified instrument, or otherwise particularly described in the register ; and a title of a lessor registered subject to such excepted estate, right, or interest is in this Act referred to as a qualified title ; and the registration of a person as first registered proprietor of leasehold land with a declaration that the lessor had a qualified title to grant the lease under which the land is held shall have the same effect as the registration of such person with a declaration that the lessor had an absolute title to grant the lease under which the land is held, save that registration with the declaration of a qualified title shall not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted.

Office lease given on registration.

16. On the entry of the name of the first registered proprietor of leasehold land on the register, the registrar shall, if required by the proprietor, deliver to him a copy of the registered lease, in this Act called an office copy, authenticated in the prescribed manner, and there

38 & 39 Vict. c. 87.

shall be endorsed thereon a statement whether any declaration, absolute or qualified, as to the title of the lessor has been made, and any other particulars relating to such lease entered in the register.

FREEHOLD AND LEASEHOLD LAND.

Regulations as to examination of title by registrar.

17. The examination by the registrar of any title under this Act shall be conducted in the prescribed manner, provided that—

(1.) Due notice shall be given, where the giving of such notice is prescribed, and sufficient opportunity be afforded to any persons desirous of objecting to come in and state their objections to the registrar; and

(2.) The registrar shall have jurisdiction to hear and determine any such objections, subject to an appeal to the Court in the prescribed manner and on the prescribed conditions; and

(3.) If the registrar, upon the examination of any title, is of opinion that the title is open to objection, but is nevertheless a title the holding under which will not be disturbed, he may approve of such title, or may require the applicant to apply to the court, upon a statement signed by the registrar, for its sanction to the registration; and

(4.) The registrar may accept as evidence recitals, statements, and descriptions of facts, matters, and parties in deeds, instruments, or statutory declarations not less than twenty years old.

Liability of registered land to easements and certain other rights.

18. All registered land shall, unless, under the provisions of this Act, the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights, and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights, and interests shall not be deemed incumbrances within the meaning of this Act; (that is to say,)

(1.) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges having their origin in tenure; and

(2.) Succession duty, land tax, tithe rentcharge, and payments in lieu of tithes, or of tithe rentcharge; and

(3.) Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements; and

(4.) Rights to mines and minerals; and

(5.) Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals; and

(6.) Rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises, exerciseable over the registered lands; and

(7.) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies: 38 & 39 Vict. c. 87.

Provided as follows:

(*a.*) Where it is proved to the satisfaction of the registrar that any land registered or about to be registered is exempt from land tax or tithe rentcharge, or from payments in lieu of tithes, or of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner; and

(*b.*) The Commissioners of Inland Revenue shall, upon the application of the proprietor of any land registered or about to be registered upon such declaration being made, or such other evidence being produced as the commissioners require, and upon payment of the prescribed fee, grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the registrar shall in the prescribed manner notify such fact on the register, and such notification shall be conclusive evidence of the fact so notified in respect of succession duty; and

(*c.*) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals as well as of the land; and

(*d.*) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered or about to be registered, the registrar may on the application of the person entitled to any such mines and minerals register him as proprietor of such mines and minerals in manner hereafter in this Act mentioned, and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals.

Where the existence of any such liabilities, rights, or interests, as are mentioned in this section, is proved to the satisfaction of the registrar, the registrar may, if he think fit, enter on the register notice of such liabilities, rights, or interests in the prescribed manner.

Discharge of incumbrance.

19. Where upon the first registration of any freehold or leasehold land, notice of an incumbrance affecting such land has been entered on the register, the registrar shall, on proof to his satisfaction of the discharge of such incumbrance, notify in the prescribed manner on the register by cancelling the original entry or otherwise the cessation of such incumbrance.

Determination of lease.

20. The registrar shall, on proof to his satisfaction of the determina-

38 & 39 Vict. c. 87.

tion of any lease of registered leasehold land, notify in the prescribed manner on the register the determination of such lease.

No acquisition of title by adverse possession.

21. A title to any land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession; but this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

PART II.

Registered Dealings with Registered Land.

Mortgage of Registered Land.

Creation of charges, and delivery of certificate of charge.

22. Every registered proprietor of any freehold or leasehold land may in the prescribed manner charge such land with the payment at an appointed time of any principal sum of money either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge, and of the power of sale, if any; the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form.

Implied covenant to pay charges.

23. Where a registered charge is created on any land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negativing such implication, a covenant with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; also a covenant, if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid.

Implied covenant in case of leaseholds to pay rent, &c., and indemnify proprietor of charge.

24. Where a registered charge is created on any leasehold land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negativing such implication, a covenant with the registered proprietor for the time being of the charge, that the person being registered proprietor of such land at the time of the creation of the charge, his executors, administrators, and assigns, will pay, perform, and observe the rent, covenants,

and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the proprietor of the charge, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims, on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them.

Entry by proprietor of charge.

25. Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of his charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession.

Foreclosure by proprietor of charge.

26. Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time.

Remedy of proprietor of charge with a power of sale.

27. Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge, or any part thereof, in the same manner as if he were the registered proprietor of such land.

Priority and discharge of registered charges.

28. Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created.

The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register in the prescribed manner by cancelling the original entry or otherwise the cessation of the charge, and thereupon the charge shall be deemed to have ceased.

Transfer of Freehold Land.

Transfer of freehold land, and delivery of land certificate.

29. Every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land.

Upon completion of the registration of the transferee the registrar shall, if required, deliver to him a land certificate in the prescribed form; he shall also, in cases where part only of the land is transferred, if required,

38 & 39 Vict. c. 87.

deliver to the transferor a land certificate, containing a description of the land retained by him.

Estate of transferee for valuable consideration of freehold land with absolute title.

30. A transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:

(1.) To the incumbrances, if any, entered on the register; and

(2.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.

Estate of transferee for valuable consideration of freehold land with qualified title.

31. A transfer for valuable consideration of freehold land registered with a qualified title shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with an absolute title, save that such transfer shall not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted.

Estate of transferee for valuable consideration of freehold land with possessory title.

32. A transfer for valuable consideration of freehold land registered with a possessory title shall not affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but, save as aforesaid, shall when registered have the same effect as a transfer for valuable consideration of the same land registered with an absolute title.

Estate of voluntary transferee of freehold land.

33. A transfer of freehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same, but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration.

Transfer of Leasehold Land.

Transfer of leasehold land, and delivery of office lease.

34. Every registered proprietor of leasehold land may, in the prescribed manner, transfer the whole of his estate in such land or in any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land.

Upon completion of the registration of the transferee, if the transfer includes the whole of the land comprised in the registered lease relating to such land, the transferee shall be entitled to the office copy of the registered lease; but if a part only is transferred, the registrar shall, if

required, according to any agreement that may have been entered into between the transferor and transferee, deliver to the one the office copy of the registered lease and to the other a fresh office copy of such lease, each of such copies showing by endorsement or otherwise the parcels of which the person to whom such copy is delivered is the registered proprietor.

Estate of transferee for valuable consideration of leasehold land with a declaration of absolute title of lessor.

35. A transfer for valuable consideration of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held shall, when registered, be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease relating to such land, with all implied or express rights, privileges, and appurtenances attached to such estate, but subject as follows:

(1.) To all implied and express covenants, obligations, and liabilities incident to such estate; and

(2.) To the incumbrances (if any) entered on the register; and

(3.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate and are by this Act declared not to be incumbrances in the case of registered freehold land;

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.

Estate of transferee for valuable consideration of leasehold land with a declaration of qualified absolute title of lessor.

36. A transfer for valuable consideration of leasehold land registered with a declaration that the lessor had a qualified title to grant the lease under which the land is held shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held, save that such transfer shall not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted from the effect of registration.

Estate of transferee for valuable consideration of leasehold land without a declaration of title of lessor.

37. A transfer for valuable consideration of leasehold land registered without a declaration of the title of the lessor shall not affect the enforcement of any estate, right, or interest affecting or in derogation of the title of the lessor to grant the lease under which the land is held; but, save as aforesaid, shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held.

Estate of voluntary transferee of leasehold land.

38. A transfer of leasehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration.

38 & 39 Vict. c. 87.

Implied covenants on transfer of leasehold estates.

39. On the transfer of any leasehold land under this Act, unless there be an entry on the register negativing such implication, there shall be implied as follows; (that is to say,)

(1.) On the part of the transferor a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and

(2.) On the part of the transferee a covenant with the transferor, that he, the transferee, his executors, administrators, or assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.

Transfer of Charges.

Transfer of charges on register.

40. The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred; the registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof.

Transmission of Land and Charges.

Transmission on death of freehold land.

41. On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any freehold land, such person shall be registered as proprietor in the place of the deceased proprietor or proprietors as may, on the application of any person interested in the land, be appointed by the registrar, regard being had to the rights of the several persons interested in such land, and in particular to the selection of such person as may for the time being appear to the registrar to be entitled according to law to be so appointed, subject to an appeal to the Court in the prescribed manner by any person aggrieved by any order of the registrar under this section.

Transmission on death of leasehold land or of charge.

42. On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any leasehold land or of any charge, the executor or administrator of such sole deceased proprietor, or

of the survivor of such joint proprietors, shall be entitled to be registered as proprietor in his place.

Transmission on bankruptcy of land or charge.

43. Upon the bankruptcy of any registered proprietor of any land or charge, or on the liquidation of his affairs by arrangement, his trustee shall be entitled to be registered as proprietor in his place.

Effect of marriage of female proprietor of freehold land.

44. The husband of any female registered proprietor of freehold land may apply to be registered as co-proprietor with his wife, but he shall be described on the register as co-proprietor in right of his wife, and on his death in her lifetime the original registry of the wife, with a change if necessary in the name, shall revive, and confer the same rights as if her husband had never been registered as co-proprietor with her, subject nevertheless to any registered disposition which may have been made by the husband and wife in the meantime. If the husband survives the wife he shall not be entitled to be registered as sole proprietor of the land, but there shall be registered as co-proprietor with him if he is entitled as tenant by the curtesy, and as sole proprietor in place of himself and his deceased wife if he is not entitled as tenant by the curtesy, such person as may, on the application of any person interested in right of the wife, be appointed by the registrar, with power for the registrar on a like application to appoint from time to time another person or other persons in the event of any person registered as co-proprietor with the husband dying in his lifetime.

Any person aggrieved by any order of the registrar under this section may appeal to the Court in the prescribed manner.

Effect of marriage of female proprietor of leasehold land or charge.

45. The husband of any female registered proprietor of leasehold land or of a charge may apply to be registered as proprietor in her place.

Nature of title of registered fiduciary proprietor.

46. Any person registered in the place of a deceased or bankrupt proprietor shall hold the land or charge in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests, or equities subject to which the deceased or bankrupt proprietor held the same; but, save as aforesaid, he shall in all respects, and in particular as respects any registered dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for a valuable consideration.

Evidence of transmission of registered proprietorship.

47. The fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner.

Repeal and re-enactment (with amendments) of 37 & 38 Vict. c. 78, s. 5; not to apply to registered lands.

48. Section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act; and, instead thereof, be it enacted, that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a

38 & 39 Vict. c. 87. chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of "The Vendor and Purchaser Act, 1874," shall not apply to lands registered under this Act.

Repealed. *See* Conveyancing Act, 1881, s. 30.

PART III.

Unregistered Dealings with Registered Land.

Effect of unregistered dispositions.

49. The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.

Notice of Leases.

Lessee may apply for registration of notice of lease.

50. Any lessee or other person entitled to or interested in a lease or agreement for a lease of registered land made subsequently to the last transfer of the land on the register, where the term granted is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with such lease or agreement, may apply to the registrar to register notice of such lease or agreement in the prescribed manner, and when so registered every registered proprietor of the land, and every person deriving title through him, excepting proprietors of incumbrances registered prior to the registration of such notice, shall be deemed to be affected with notice of such lease or agreement as being an incumbrance on the land in respect of which the notice is entered.

Manner of registering notices of leases.

51. In order to register notice of a lease or agreement for a lease, if the registered proprietor of the land does not concur in such registry, the applicant shall obtain an order of the Court, authorising the registration of notice of such lease or agreement and shall deliver such order to

the registrar, accompanied with the original lease or agreement or a copy thereof, and thereupon the registrar shall make a note in the register identifying the lease or agreement or copy so deposited, and the lease or agreement or copy so deposited shall be deemed to be the instrument of which notice is given; but if the registered proprietor concurs in such registry, notice may be entered in such manner as may be agreed upon. 38 & 39 Vict. c. 87.

Notice of Estates in Dower or by the Curtesy.

Registration of notices of estates in dower or by the curtesy.

52. Any person entitled to an estate in dower or by the curtesy in any registered land may apply in the prescribed manner to the registrar to register notice of such estate; and the registrar, if satisfied of the title of such person to such estate, shall register notice of the same accordingly in the prescribed form; and when so registered, such estate shall be an incumbrance appearing on the register, and shall be dealt with accordingly.

Cautions against Registered Dealings.

Caution against registered dealings how to be lodged.

53. Any person interested under any unregistered instrument, or interested as a judgment creditor, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect that no dealing with such land or charge be had on the part of the registered proprietor until notice has been served upon the cautioner.

The caution shall be supported by an affidavit or declaration made by the cautioner or his agent in the prescribed form, and containing the prescribed particulars.

Provided, that a person interested under a lease or agreement for a lease of which notice has been entered on the register, or entitled to an estate in dower, or estate by the curtesy, of which notice has been entered on the register, shall not be entitled to a caution in respect of such lease or estate in dower or by the curtesy.

Cautioner entitled to notice of proposed registered dealings.

54. After any such caution has been lodged in respect of any land or charge, the registrar shall not, without the consent of the cautioner, register any dealing with such land or charge until he has served notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of the prescribed number of days next ensuing the date at which such notice is served; and after the expiration of such time as aforesaid the caution shall cease unless an order to the contrary is made by the registrar, and upon the caution so ceasing the land or charge shall be dealt with in the same manner as if no caution had been lodged.

Registered dealings delayed on bond being given.

55. If before the expiration of the said period the cautioner, or some other person on his behalf, appears before the registrar, and gives sufficient security to indemnify every party against any damage that may be

38 & 39 Vict. c. 87.

sustained by reason of any dealing with the land or charge being delayed, the registrar may thereupon, if he thinks fit so to do, delay registering any dealing with the land or charge for such further period as he thinks just.

Compensation for improper lodging of caution.

56. If any person lodges a caution with the registrar without reasonable cause, he shall be liable to make to any person who may have sustained damage by the lodging of such caution such compensation as may be just, and such compensation shall be recoverable as a debt by the person who has sustained damage from the person who lodged the caution.

Any person aggrieved by any act done by the registrar in relation to cautions under this Act, may appeal to the Court in the prescribed manner.

Inhibition against registered Dealings without Order of Court.

Power of Court or registrar to inhibit registered dealings.

57. The Court, or, subject to an appeal to the Court, the registrar, upon the application of any person interested, made in the prescribed manner, in relation to any registered land or charge, may, after directing such inquiries (if any) to be made and notices to be given and hearing such persons as the Court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named in such order or entry, or generally until further order or entry, any dealing with any registered land or registered charge.

The Court or registrar may make or refuse to make any such order or entry, and annex thereto any terms or conditions the Court or registrar may think fit, and discharge such order or cancel such entry when granted, with or without costs, and generally act in the premises in such manner as the justice of the case requires.

Any person aggrieved by any act done by the registrar in pursuance of this section may appeal to the Court in the prescribed manner.

Power of Registered Proprietor to impose Restrictions.

Power to place restrictions on register.

58. Where the registered proprietor of any land is desirous for his own sake, or at the request of some person beneficially interested in such land, to place restrictions on transferring or charging such land, such proprietor may apply to the registrar to make an entry in the register that no transfer shall be made of or charge created on such land, unless the following things, or such of them as the proprietor may determine, are done; (that is to say,)

Unless notice of any application for a transfer or for the creation of a charge is transmitted by post to such address as he may specify to the registrar:

Unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or the creation of a charge: 38 & 39 Vict. c. 87.

Unless some such other matter or thing is done as may be required by the applicant and approved by the registrar.

Registrar to enter restrictions in register.

59. The registrar shall thereupon, if satisfied of the right of the applicant to give such directions, make a note of such directions on the register, and no transfer shall be made or charge created except in conformity with such directions; but it shall not be the duty of the registrar to enter any of the above directions, except upon such terms as to payment of fees and otherwise as may be prescribed, or to enter any restriction that the registrar may deem unreasonable, or calculated to cause inconvenience; and any such directions may at any time be withdrawn or modified at the instance of all the persons for the time being appearing by the registry to be interested in such directions, and shall also be subject to be set aside by the order of the Court.

PART IV.

Provisions supplemental to Foregoing Parts of Act.

Caution against Entry of Land on Register.

Caution against registration of land.

60. Any person having or claiming such an interest in any land which is not already registered as entitles him to object to any disposition thereof being made without his consent, may lodge a caution with the registrar to the effect that the cautioner is entitled to notice in the prescribed form, and to be served in the prescribed manner, of any application that may be made for the registration of such land.

Caution to be supported by affidavit.

61. The caution shall be supported by an affidavit or declaration in the prescribed form, stating the nature of the interest of the cautioner, the land to be affected by such caution, and such other matters as may be prescribed.

Cautioner entitled to notice of proposed registration of land.

62. After a caution has been lodged in respect of any land, which has not already been registered, registration shall not be made of such land until notice has been served on the cautioner to appear and oppose, if he thinks fit, such registration, and the prescribed time has elapsed since the date of the service of such notice, or the cautioner has entered an appearance, which may first happen.

Compensation for improper lodging of caution.

63. If any person lodges a caution with the registrar without reasonable cause, he shall be liable to make to any person who may have sustained damage by the lodging of such caution such compensation as may be just, and such compensation shall be deemed to be a debt due to the person who has sustained damage from the person who has lodged the caution.

Saving as to

64. A caution lodged in pursuance of this Act shall not prejudice the

38 & 39 Vict. c. 87.

claim or title of any person, and shall have no effect whatever except as in this Act mentioned.

effect of caution.

Crown Lands.

Facilities of registration of Crown lands.

65. With respect to land or any estate, right, or interest in land vested in Her Majesty, her heirs or successors, either in right of the Crown or of the Duchy of Lancaster, or otherwise, or vested in any public officer or body in trust for the public service, the public officer or body having the management thereof (if any), or, if none, then such person as Her Majesty, her heirs or successors, may by writing under her or their sign manual appoint, may represent the owner of such land, estate, right, or interest for all the purposes of this Act, and shall be entitled to such notices, and may make and enter any such application or cautions, and do all such other acts, as any owner of land, or of any estate, right, or interest therein (as the case may be) is entitled to receive, make, enter, or do under this Act; and with respect to land or any estate, right, or interest in land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall for the time being, or as the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, may in writing appoint, may act as and represent the owner of such land, estate, right, or interest for all the purposes of this Act, and shall be entitled to receive such notices, and may make and enter any such application or cautions, and do all such other acts as any owner of land or of any estate, right, or interest in land (as the case may be) is entitled to make, enter, or do under this Act.

Registry of land below high-water mark.

66. If it appears to the registrar that any land, application for registration whereof is made to him, comprises land below high-water mark at ordinary spring tides, he shall not register the land unless and until he is satisfied that at least one month's notice in writing of the application has been given to the Board of Trade; and in case of land in the county palatine of Lancaster, also to the proper officer of the Duchy of Lancaster; and in case of land in the counties of Cornwall or Devon, also to the proper officer of the Duke of Cornwall; and in all other cases also to the Commissioners of Her Majesty's Woods, Forests, and Land Revenues.

As to Proceedings on and before Registration.

Registration of lands of different tenures.

67. If it appears to the registrar that any land, application for registration whereof is made to him, comprises land of freehold tenure and also land of a tenure other than freehold intermixed and undistinguishable, he may, notwithstanding anything in this Act, register the land, but he shall enter notice on the register in such manner as he thinks fit of the facts relating to the tenure of the land, and the tenure of the portion of the land other than freehold shall remain unaffected by the registration.

38 & 39 Vict. c. 87.

Trustees may sell by medium of registry.

68. Any person holding land on trust for sale, and any trustee, mortgagee, or other person having a power of selling land, may authorise the purchaser to make an application to be registered as first proprietor with any title which a proprietor is authorised to be registered with under this Act, and may consent to the performance of the contract being conditional on his being so registered, or may himself apply to be registered as such proprietor with the consent of the persons (if any) whose consent is required to the exercise by the applicant of his trust or power of sale; and the amount of all costs, charges, and expenses properly incurred by such person in or about such application shall in all cases be ascertained and declared by the registrar, and shall be deemed to be costs, charges, and expenses properly incurred by such person in the execution of his trust or in pursuance of his power; and such person may retain or reimburse the same to himself out of any money coming to him under the trust or power, and he shall not be liable to any account in equity in respect thereof.

Registration of part owners.

69. Any two or more persons entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights, or interests in land as together make up such an estate as would, if vested in one person, entitle him to be registered as proprietor of the land, may (subject as in this Act mentioned with respect to the number of persons to be registered in respect of the same land), apply to the registrar to be registered as joint proprietors, in the same manner and with the same incidents, so far as circumstances admit, in and with which it is in this Act declared that any individual proprietor may be registered.

Instruments and facts affecting the title to be disclosed on registrations.

70. Before the completion of the registration of any land in respect of which an examination of title is required, the vendor and his solicitor, in cases where the applicant is a person who has contracted to buy such land, and in all other cases the applicant for registration and his solicitor, shall each, if required by the registrar, make an affidavit or declaration that to the best of his knowledge and belief all deeds, wills, and instruments of title, and all charges and incumbrances affecting the title to the land which is the subject of the application, and all facts material to such title, have been disclosed in the course of the investigation of title made by the registrar. The registrar may require any person making an affidavit or declaration in pursuance of this section to state in his affidavit or declaration what means he has had of becoming acquainted with the several matters referred to in this section; and if the registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete the registration until such further or other evidence is produced.

Production of deeds.

71. When an application has been made to the registrar for the registration of any land, if any person has in his possession or custody any deeds, instruments, or evidences of title relating to or affecting such

38 & 39 Vict. c. 87.

land, to the production of which the applicant, or any trustee for him is entitled, the registrar may require such person to show cause, within a time limited, why he should not produce such deeds, instruments, or evidences of title to the registrar, or otherwise, as the registrar may deem fit; and, unless cause is shown to the satisfaction of the registrar within the time limited, such deeds, instruments, and evidences of title may be ordered by the registrar to be produced at the expense of the applicant, at such time and place, and in such manner, and on such terms as the registrar thinks fit.

Any person aggrieved by any order of the registrar under this section may appeal in the prescribed manner to the Court, which may annul or confirm the order of the registrar with or without modification.

If any person disobeys any order of the registrar made in pursuance of this section, the registrar may certify such disobedience to the Court, and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the Court in the same manner in all respects as if the order made by the registrar were the order of the Court.

Deeds to be marked with notice of registration.

72. A person shall not be registered as proprietor of land until, if required by the registrar, he has produced to him such documents of title as will in the opinion of the registrar, when stamped or otherwise marked, give notice to any purchaser or other person dealing with such land of the fact of the registration, and the registrar shall stamp or otherwise mark the same accordingly, or until he has otherwise satisfied the registrar that the fact of such registration cannot be concealed from a purchaser or other person dealing with the land.

Costs of application for registry.

73. All costs, charges, and expenses that are incurred by any parties in or about any proceedings for registration of land shall, unless the parties otherwise agree, be taxed by the taxing officer of the Court of Chancery as between solicitor and client, but the persons by whom and the proportions in which such costs, charges, and expenses are to be paid shall be in the discretion of the registrar, and shall be determined according to orders of the registrar, regard being had to the following provision; namely, that any applicant under this Act is liable *primâ facie* to pay all costs, charges, and expenses incurred by or in consequence of his application, except in a case where parties object whose rights are sufficiently secured without their appearance, or where any costs, charges, or expenses are incurred unnecessarily or improperly, and subject to this proviso, that any party aggrieved by any order of the registrar under this section may appeal in the prescribed manner to the Court, which may annul or confirm the order of the registrar, with or without modification.

If any person disobeys any order of the registrar made in pursuance of this section, the registrar may certify such disobedience to the Court, and thereupon such person, subject to such right of appeal as aforesaid,

may be punished by the Court in the same manner in all respects as if the order made by the registrar were the order of the Court. 38 & 39 Vict. c. 87.

Doubtful Questions arising on Title.

Registrar may state case for Court of law or direct issue.

74. Whenever, upon the examination of the title to any land the registrar entertains a doubt as to any matter of law or fact arising upon such title, he may, upon the application of any party interested in such land, refer a case for the opinion of any of Her Majesty's superior Courts, with power for the Court to direct an issue to be tried before any jury for the purpose of determining any fact; the registrar may also name the parties to such case, and the manner in which the proceedings in relation thereto are to be brought before the Court to which such case is referred.

Opinion of Court or decision of jury, how far conclusive.

75. The opinion of any Court to whom any case is referred by the registrar shall be conclusive on all the parties to such case, unless the Court before whom such case is heard permits an appeal to be had.

Intervention of Court in case of incapacitated persons.

76. Where any infants, married women, idiots, lunatics, persons of unsound mind, persons absent beyond seas, or persons yet unborn, are interested in the land in respect of the title to which any question arises as aforesaid, any other persons interested in such land may apply to "the Court," as defined by this Act, for a direction that the opinion of the Court to whom the case is referred under this Act shall be conclusively binding on such infants, married women, idiots, lunatics, persons of unsound mind, persons beyond the seas, or unborn persons.

Power of Court to bind interests of incapacited persons.

77. The Court as defined by this Act shall hear the allegations of all parties appearing before it. It may disapprove altogether, or may approve, either with or without modification, of the directions of the registrar in respect to any case referred as to the title of land; it may also, if necessary, appoint a guardian or other person to appear on behalf of any infants, married women, idiots, lunatics, persons of unsound mind, persons absent beyond seas, or unborn persons; and if such Court is satisfied that the interests of the persons labouring under disability, absent, or unborn, will be sufficiently represented in any case, it shall make an order declaring that all persons, with the exceptions (if any), named in the order, are to be conclusively bound, and thereupon all persons, with such exceptions (if any) as aforesaid, shall be conclusively bound by any decision of the Court having cognisance of the case in which such persons are concerned.

As to Land Certificates, Office Copies of Leases, and Certificates of Charge.

Loss of land certificate, or certificate of charge, or office copy of lease.

78. If any land certificate or office copy of a registered lease or certificate of charge is lost, mislaid, or destroyed, the registrar may, upon being satisfied of the fact of such loss, mislaying, or destruction, grant a new land certificate or office copy or certificate of charge in the place of the former one.

38 & 39 Vict. c. 87.

Renewal of land certificate, or certificate of charge, or office copy of lease.

79. The registrar may, upon the delivery up to him of a land certificate or of an office copy of a registered lease or of a certificate of charge, grant a new land certificate or office copy of a lease or certificate of charge in the place of the one delivered up.

Land certificate, certificate of charge, and office copy of lease to be evidence.

80. Any land certificate or certificate of charge shall be *primâ facie* evidence of the several matters therein contained, and the office copy of a registered lease shall be evidence of the contents of the registered lease.

Effect of deposit of land certificate.

81. Subject to any registered estates, charges, or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title deeds of the land.

Special Hereditaments.

Registry of advowsons and other special hereditaments.

82. The registrar may register the proprietor of any advowson, rent, tithes impropriate, or other incorporeal hereditament of freehold tenure, enjoyed in gross, also the proprietor of any mines or minerals where the same have been severed from the land, in the same manner and with the same incidents in and with which he is by this Act empowered to register land, or as near thereto as circumstances admit.

The registrar may also in the prescribed manner register any fee farm grant, or other grant, reserving rents or services to which the fee simple estate in any freehold land about to be registered or registered may be subject, with such particulars of the land or services, and the conditions annexed to the non-payment or non-performance or otherwise of such rent and services as may be prescribed, and any record so made shall be conclusive evidence as to the rents, services, and conditions so recorded, and such fee simple estate as last aforesaid shall be subject thereto accordingly.

General Provisions.

Enactments as to registration.

83. The following enactments shall be made with respect to registration of title:

(1.) There shall not be entered on the register or be receivable by the registrar, any notice of any trust, implied, express, or constructive; and

(2.) No person shall be registered as proprietor of any undivided share in any land or charge, and a number of persons exceeding the prescribed number shall not be registered as proprietors of the same land or charge; and if the number of persons showing title exceeds such prescribed number, such of them not exceeding the prescribed number as may be agreed upon, or as the registrar may in case of difference decide, shall be registered as proprietors; and

(3.) Upon the occasion of the registry of two or more persons as proprietors of the same land or of the same charge, an entry may, with their consent, be made on the register, to the effect that when the number of such proprietors is reduced below a certain specified number, no registered disposition of such land or charge shall be made, except under the order of the court ; and

(4.) Where land is registered in the names of husband and wife as co-proprietors, no registered disposition of such land shall take place until the wife, if alive, has been examined in the prescribed manner and has assented to such disposition after full explanation of her rights in the land and of the effect of the proposed disposition ; and

(5.) Registered land shall be described in such manner as the registrar thinks best calculated to secure accuracy, but such description shall not be conclusive as to the boundaries or extent of the registered land ; and

(6.) No alteration shall be made in the registered description of land, except under the order of the Court or by way of explanation ; but this provision shall not be construed to extend to registered dealings with registered land in separate parcels by the registered description although such land was originally registered as one estate ; and

(7.) Previously to registering any proposed purchaser as first proprietor of any land or to registering any disposition of land, it shall be the duty of the registrar to ascertain that all such stamp duties have been satisfied as would be payable if the land had been conveyed by an unregistered disposition to such proposed purchaser, or the disposition to be registered had been an unregistered disposition :

(8.) The provisions of this Act with respect to the liability of registered land to succession duty and to the grant of a certificate by the Commissioners of Inland Revenue in respect of the exemption from succession duty, and to the notification of such exemption on the register, and to the effect of such notification, shall apply with the necessary variations to a registered charge under this Act.

Annexation of conditions to registered land.

84. Where any land is about to be registered, or any registered land is about to be transferred to a purchaser for valuable consideration, there may be registered as annexed thereto, subject to general rules and in the prescribed manner, a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor and every transferee, and every other person deriving title from him, shall be deemed

38 & 39 Vict. c. 87.

to be affected with notice of such condition; nevertheless, any such condition may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that such modification will be beneficial to the persons principally interested in the enforcement of such condition.

Registered lands to be within the Trustee Act, 1850.

85. All the provisions of the Trustee Act, 1850, and of any Act amending the same, shall apply to land and charges registered under this Act, but this enactment shall not prejudice the applicability to such land and charges of any provisions of such Acts relating to land or choses in action.

Indemnity of registrar.

86. The registrar shall not, nor shall the assistant registrar nor any person acting under his authority, or under any order or general rule made in pursuance of this Act, be liable to any action, suit, or proceeding for or in respect of any act or matter *bonâ fide* done or omitted to be done in the exercise or supposed exercise of the powers of this Act, or any order or general rule made in pursuance of this Act.

As to Married Women.

Provision as to married women.

87. Where a married woman, entitled for her separate use, and not restrained from anticipation, is desirous of giving any consent, or becoming party to any proceeding under this Act, she shall be deemed to be an unmarried woman, but when any other married woman is desirous of giving any consent, or becoming party to any proceeding under this Act she shall be examined in the prescribed manner, and it shall be ascertained that she is acting freely and voluntarily, and the Court may, where it sees fit, appoint a person to act as the next friend of a married woman for the purpose of any proceeding under this Act, and may from time to time remove or change such next friend.

As to Infants and Lunatics.

Provision as to other persons under disability.

88. Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding in relation to any land or charge under this Act, is an infant, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such person respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of this Act; where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person is of unsound mind or incapable of managing his affairs, but has not been found lunatic under an inquisition, it shall be lawful for the Court to appoint a guardian of such person for the purpose of any proceedings under this Act, and from time to time to change such guardian.

As to Notices.

Address of persons on register.

89. Every person whose name is entered on the register as proprietor of land or of a charge, or as cautioner, or as entitled to receive any notice, or in any other character, shall furnish to the registrar a place of address in the United Kingdom.

Service of notices.

90. Every notice by this Act required to be given to any person shall be served personally, or sent through the post in a registered letter marked outside "Office of Land Registry," and directed to such person at the address furnished to the registrar, and unless returned, shall be deemed to have been received by the person addressed within such period, not less than seven days, exclusive of the day of posting, as may be prescribed.

Return of notices by post office.

91. Her Majesty's Postmaster General shall give directions for the immediate return to the registrar of all letters marked as aforesaid, and addressed to any person who cannot be found, and on the return of any letter containing any notice, the registrar shall act in the matter requiring such notice to be given in manner prescribed.

Purchasers not affected by omission to send notices.

92. A purchaser for valuable consideration shall not be affected by the omission to send any notice by this Act directed to be given, or by the non-receipt thereof.

Specific Performance.

Power of Court in suit for specific performance.

93. Where a suit is instituted for the specific performance of a contract relating to registered land, or a registered charge, the Court having cognisance of such suit may by summons, or by such other mode as it deems expedient, cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same, to appear in such suit, and show cause why such contract should not be specifically performed, and the Court may direct that any order made by the Court in such suit shall be binding on such parties or any of them.

Costs in suit for specific performance.

94. All costs incurred by any parties so appearing in a suit to enforce against a vendor specific performance of his contract to sell registered land or a registered charge shall be taxed as between solicitor and client, and unless the Court otherwise orders, be paid by such vendor.

Rectification of the Register.

Establishment of adverse title to land.

95. Subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such Court is of opinion that a rectification of the register is required, such Court may make an order directing the register to be rectified in such manner as it thinks just.

Register to be

96. Subject to any estates or rights acquired by registration in pursu-

38 & 39 Vict. c. 87.

ance of this Act, if any person is aggrieved by any entry made or by the omission of any entry from the register under this Act, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved by such entry, omission, default, or delay may apply to the Court in the prescribed manner for an order that the register may be rectified, and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register.

rectified under order of Court.

Registrar to obey orders of Court.

97. The registrar shall obey the order of any competent Court in relation to any registered land on being served with such order or an official copy thereof.

As to Fraud.

Fraudulent dispositions.

98. Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.

Suppression of deeds and evidence.

99. If in the course of any proceedings before the registrar or the Court in pursuance of this Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award.

Certain fraudulent acts declared to be misdemeanors.

100. If any person fraudulently procures, attempts to fraudulently procure, or is privy to the fraudulent procurement of any entry on the register, or of any erasure from the register or alteration of the register, such person shall be guilty of a misdemeanor, and upon conviction on indictment be liable to imprisonment for any term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award; and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.

False declarations.

101. If any person in any affidavit or declaration required or authorised to be made for any purpose under this Act, or any order or general rules made in pursuance thereof, wilfully makes a false statement in any material particular, he shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award.

102. No proceeding or conviction for any act declared by this Act to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity.

Saving of civil remedy.

103. Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any Court of Law or Equity, or in the Courts of Bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding under this Act.

Saving of obligation to make discovery.

Inspection of Register.

104. Subject to such regulations and exceptions and to the payment of such sums as may be fixed by general rules, any person registered as proprietor of any land or charge, and any person authorised by any such proprietor, or by an order of the Court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge.

Inspection of documents.

Saving Clause.

105. Nothing in this Act contained shall affect any right of Her Majesty to any escheat or forfeiture.

Saving clause as to escheat.

PART V.

Administration of Law and Miscellaneous.

(1.) *Office of Land Registry.*

106. There shall be an office in London to be called the Office of Land Registry, the business of which shall be conducted by a registrar to be appointed by the Lord Chancellor, with such number of officers (namely, assistant registrars, clerks, messengers, and servants,) as the Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury as to number, may from time to time appoint.

Office of land registry, and appointment and payment of officers.

A person shall not be qualified to be appointed registrar unless he is a barrister of not less than ten years' standing, and a person shall not be qualified to be appointed an assistant registrar unless he is either a barrister or solicitor or certificated conveyancer of not less than five years' standing.

The registrar, assistant registrars, clerks, messengers, and servants shall receive such salaries or remuneration as the Commissioners of Her Majesty's Treasury may from time to time direct.

The salaries of the registrar, assistant registrar, clerks, messengers, and servants, and such incidental expenses of carrying this Act into

38 & 39 Vict. c. 87.

effect as may be sanctioned by the Commissioners of Her Majesty's Treasury, shall be paid out of moneys provided by Parliament.

The Lord Chancellor may from time to time make regulations for the office of land registry, and for assigning the duties to the respective officers, and determining the acts of the registrar which may be done by the assistant registrar, and may from time to time revoke and alter any such regulations, and make new regulations. All such regulations for the time being in force shall have effect as if they were enacted in this Act.

Seal of office of land registry.

107. There shall be a seal for the office of land registry.

Registrar to frame and promulgate forms.

108. Subject to the provisions of this Act, the registrar shall conduct the whole business of registering land under this Act; he shall frame and cause to be printed and circulated or otherwise promulgated such forms and directions as he may deem requisite or expedient for facilitating proceedings under this Act.

Power of registrar to summon witnesses.

109. The registrar or any officer of the registry office authorised by him in writing may administer an oath or take a voluntary declaration in pursuance of the Acts in that behalf for any of the purposes of this Act, and the registrar may, by summons under the seal of the office, require the attendance of all such persons as he may think fit in relation to the registration of any title; he may also, by a like summons, require any person having the custody of any map, survey, or book made or kept in pursuance of any Act of Parliament to produce such map, survey, or book for his inspection; he may examine upon oath any person appearing before him and administer an oath accordingly; and he may allow to every person summoned by him the reasonable charges of his attendance.

Any charges allowed by the registrar in pursuance of this section shall be deemed to be charges incurred in or about proceedings for registration of land, and may be dealt with accordingly.

Non-attendance or refusal to answer questions.

110. If any person, after the delivery to him of such summons as aforesaid, or of a copy thereof, wilfully neglects or refuses to attend in pursuance of such summons, or to produce such maps, surveys, books, or other documents as he may be required to produce under the provisions of this Act, or to answer upon oath or otherwise such questions as may be lawfully put to him by the registrar under the powers of this Act, he shall incur a penalty not exceeding twenty pounds, to be recovered on summary conviction; provided that no person shall be required to attend in obedience to any summons or to produce such documents as aforesaid unless the reasonable charges of his attendance and of the production of such documents be paid or tendered to him.

Power of Lord Chancellor to make general rules.

111. Subject to the provisions of this Act, the Lord Chancellor may, with the advice and assistance of the registrar, from time to time make, and when made may rescind, annul, or add to, general rules in respect of all or any of the following matters; that is to say,

(1.) The mode in which the register is to be made and kept; and

(2.) The forms to be observed, the precautions to be taken, the instruments to be used, the notices to be given, and the evidence to be adduced in all proceedings before the registrar or in connexion with registration, and in particular with respect to the reference to a conveyancing counsel of the Court of Chancery of any title to land proposed to be registered with an absolute title; and

(3.) The custody of any instruments from time to time coming into the hands of the registrar, with power to direct the destruction of any such instruments where they have become altogether superseded by entries in the register, or have ceased to have any effect:

(4.) The costs to be charged by solicitors or certificated conveyancers in or incidental to or consequential on the registration of land, or any other matter required to be done for the purpose of carrying this Act into execution, with power to require such costs to be payable by commission, per-centage, or otherwise, and to bear a certain proportion to the value of the land registered, or to be determined on such other principle as may be thought expedient; and

(5.) The taxation of such costs and the persons by whom such costs are to be paid; and

(6.) Any matter by this Act directed or authorised to be prescribed; and

(7.) Any other matter or thing, whether similar or not to those above mentioned, in respect of which it may be expedient to make rules for the purpose of carrying this Act into execution:

Any rules made in pursuance of this section shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if enacted in this Act, and shall be judicially noticed.

Any rules made in pursuance of this section shall be laid before both Houses of Parliament within three weeks after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within three weeks after the beginning of the then next session of Parliament.

See General Rules by Lord Cairns, C., dated 24th December, 1875.

Principles on which fees determined.

112. The Lord Chancellor may from time to time, with the concurrence of the Commissioners of the Treasury, make, and when made revoke, alter, or add to rules with respect to the amount of fees payable under this Act, regard being had to the following matters:

(1.) In the case of the registration of land or of any transfer of land on the occasion of a sale,—to the value of the land as determined by the amount of purchase money; and

(2.) In the case of the registration of land, or of any transfer of land not upon a sale,—to the value of the land, to be ascertained in such manner as may be prescribed; and

38 & 39 Vict. c. 87.

(3.) In the case of registration of a charge or of any transfer of a charge,—to the amount of such charge.

Mode of taking fees.

113. The following rules shall be observed with respect to the fees payable in pursuance of this Act:

(1.) The fees shall, except so far as the Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury, may from time to time otherwise direct, be taken by stamps; and if not taken by stamps, shall be taken, applied, accounted for, and paid over in such manner as may be directed by the Commissioners of Her Majesty's Treasury with the concurrence of the Lord Chancellor; and

(2.) Such stamps shall be impressed or adhesive, as the Commissioners of Her Majesty's Treasury from time to time direct; and

(3.) The Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for regulating the use of such stamps, and for ensuring the proper cancellation of stamps, and for keeping accounts of such stamps; and

(4.) The Commissioners of Inland Revenue shall keep a separate account of all money received in respect of stamps under this Act, and subject to the deduction of any expenses incurred by those Commissioners in the execution of this Act, the money so received shall, under the direction of the Commissioners of Her Majesty's Treasury, be carried to and form part of the Consolidated Fund:

(5.) Any person who forges or counterfeits any such stamp, or uses any such stamp, knowing the same to be forged or counterfeit, or to have been previously cancelled or used, shall be guilty of forgery, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.

See Order by Lord Cairns, C., dated 30th December, 1875.

Description and Powers of the Court.

"The Court" to mean according to circumstances, Court of Chancery and County Court.

114. For the purposes of this Act, "the court" shall mean the Court of Chancery or the County Court, according as the one or other of such Courts may be prescribed by the general rules made for carrying into effect this Act.

The County Court shall, in cases where it has jurisdiction under this Act, have, for all the purposes of such jurisdiction, all the powers of the Court of Chancery.

Any jurisdiction of the Court of Chancery or County Court under this Act may be exercised by any judge of the said Court, whether sitting in open Court or in Chambers.

Lord Chancellor may assign duties as to

115. The Lord Chancellor may from time to time assign the duties

vested in the Court of Chancery in relation to matters under this Act to any particular judge or judges of that Court.

Transfer to particular Judges.

116. Any person aggrieved by any order of a judge of a County Court may, within the prescribed time and in the prescribed manner, appeal to the Court of Chancery.

Appeal from County Court.

The Court on hearing such appeal may give judgment affirming, reversing, or modifying the order appealed from, and may finally decide thereon, and make such order as to costs in the Court below and of the appeal as may be agreeable to justice; and if the Court alter or modify the order, such order so altered or modified shall be of the like effect as if it were the order of the County Court. The Court of Chancery may also, in cases where the Court thinks it expedient so to do, instead of making a final order, remit the case, with such directions as the Court may think fit, to the Court below.

Appeal from Court of Chancery.

117. Any person aggrieved by an order made under this Act by the Court of Chancery otherwise than on appeal from a County Court, may appeal within the prescribed time, in the same manner and with the same incidents in and with which orders made by the Court of Chancery on cases within the ordinary jurisdiction of such Court may be appealed from.

As to District Registries.

Power to form district registries by general orders.

118. The Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury, shall have power by general orders from time to time to do all or any of the following things:

(1.) To create district registries for the purposes of registration of land within the defined districts respectively, and to alter any districts which shall have been so created; and

(2.) To direct, by notice to be published in the *London Gazette*, when (upon or after the commencement of this Act) registration of land is to commence in any district, and the place at which lands are to be registered; and

(3.) To commence registration of land in any one or more district or districts, pursuant to any such notice; and

(4.) To appoint district registrars, assistant district registrars, clerks, messengers, and servants to perform the business of registration in any district which may from time to time be created a district for registration under this Act.

The Lord Chancellor may, with the like concurrence, from time to time make, rescind, alter, or add to any order made in pursuance of this section.

Qualification of the district and assistant district registrar.

119. A person shall not be qualified to be appointed district registrar under this Act, unless he is a barrister or solicitor or certificated conveyancer of not less than ten years' standing, and a person shall not be qualified to be appointed an assistant district registrar under this Act unless he is either a barrister or solicitor or certificated conveyancer of

38 & 39 Vict. c. 87.

not less than five years standing. A district registrar or assistant district registrar may, with the assent of the Lord Chancellor, follow another calling.

Seal for district registry.

120. A seal shall be prepared for each district registry office, and any instrument purporting to be sealed with such seal shall be admissible in evidence, and if a copy, the same shall be admissible in like manner as the original.

Powers of district registrar, and appeals from him.

121. Subject to general rules each district registrar and assistant district registrar shall, as regards the land within his jurisdiction, have the same powers and indemnity as are herein given to the registrar and assistant registrar in the office of land registry, and there shall be the same appeal as in the case of the registrar; and any orders made by a district registrar or assistant district registrar may in like manner be made orders of and be enforced by the Court: Provided always, that the Lord Chancellor may, by general rules, make provision for the duties of district registrar, as regards all or any of the proceedings preliminary to first registration, or as regards any matters which the district registrar has to determine, or any other matters, being performed by the registrar or assistant registrar in the office of land registry, and for any district registrar, in any cases obtaining directions from or acting with the sanction of such registrar or assistant registrar; and any such orders may from time to time be rescinded, altered, or annulled by the Lord Chancellor, and all orders made in pursuance of this section shall be of the same force as if inserted in this Act, and shall be judicially noticed.

Application of general orders, &c., to districts.

122. The general orders, rules, forms, directions, and fees for the time being applying to and payable in the office of land registry shall also apply to and be payable in all the district registries, subject to any alteration or addition for the time being made for any district by the Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury, as to fees.

(2.) *Temporary Provisions.*

Transfer of existing staff to new registry office.

123. The registrar, assistant registrar, examiners of title, clerks, messengers, and servants at the time of the commencement of this Act attached to the office of land registry, shall from and after the commencement of this Act be attached to the office of land registry as constituted by this Act.

The registrar and other officers and persons so attached shall have the same relative rank, such rank being in the case of the assistant registrar above the rank of any other assistant registrar or any district registrar who may be appointed in pursuance of this Act, and hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions or superannuation allowances, be entitled to the same pensions or superannuation allowances, as if this Act had not passed; and their service under this Act shall, as

regards their claim to pension or superannuation allowance, be deemed a continuance of their former service, but in the event of any such officer being appointed to a new office in pursuance of this Act, service under the Land Registry Act, 1862, shall be deemed to be service under this Act for the purposes of entitling such last-mentioned officer to salary, superannuation, compensation, gratuity, or other allowances under the Superannuation Acts. The messengers and servants of the office of land registry shall, during the tenure of office by the existing registrar, be appointed and removed by him. 38 & 39 Vict. c. 87.

The Lord Chancellor may, by rules, distribute the business to be performed in the office of land registry as constituted under this Act amongst the several officers attached thereto by this section, in such manner as he may think just; and such officers shall perform such duties in relation to such business as may be directed by such rules, with this qualification, that the duties required to be performed by any officer shall be the same as or duties analogous to those which he performed previously to the passing of this Act.

See Rule by Lord Cairns, C., dated 24th December, 1875.

The officers so attached as aforesaid, and their successors in office, shall for all the purposes of the Land Registry Act, 1862, so far as it will remain in operation after the passing of this Act, and for all the purposes of the Improvement of Land Act, 1864, and of the Mortgage Debenture Act, 1865, be deemed to be officers acting under the Land Registry Act, 1862, and having to discharge the duties belonging to officers acting under such Act.

Transfer of books and papers.

124. All books, documents, and papers in the possession of the office of land registry as constituted before the passing of this Act, or of any person attached to or performing any ministerial duty in aid of such office, shall be dealt with in such manner as the Lord Chancellor may by order direct, and any person failing to comply with any order of the Lord Chancellor made for the purpose of giving effect to this section, shall be punished in the same manner as if he had been guilty of a contempt of the Court of Chancery.

Registration under Act of 1862 to cease, &c.

125. From and after the commencement of this Act, application for the registration of an estate under the Land Registry Act of 1862 shall not be entertained.

Possible re-registry of estates already registered under the Act of 1862.

126. From and after the commencement of this Act, the Lord Chancellor may, by order, provide for the registration under this Act, without cost to the parties interested, of all titles registered under the Land Registry Act, 1862, and care shall be taken in such order to protect any rights acquired in pursuance of registry under such last-mentioned Act, and any order so made by the Lord Chancellor shall have the same effect as if it were enacted in this Act; nevertheless it shall not be obligatory on any person interested in an estate registered under the said Land Registry Act, 1862, to cause such estate to be regis-

38 & 39 Vict. c. 87.

tered under this Act, and until such estate is registered under this Act, the Act of 1862 shall apply thereto in the same manner as if this Act had not passed.

See Order by Lord Cairns, C., dated 1st January, 1876.

Local Registries.

Land registered under Act to be exempted from registry of deeds.

127. Any land situate within the jurisdiction of any of the following local registries; that is to say,

(1.) The registry for the county of Middlesex; or

(2.) The registry for the West Riding of Yorkshire; or

(3.) The registry for the North Riding of Yorkshire; or

(4.) The registry for the East Riding of Yorkshire and the town and county of the town of Kingston-upon-Hull;

shall, if registered under this Act, from and after the date of the registration thereof, be exempt from such jurisdiction; and no document relating to any such registered land executed and no testamentary instrument relating to any such registered land coming into operation subsequently to such date as last aforesaid shall be required to be registered in any of the said local registries.

Compensation to officers of local registries of deeds.

128. If any person who is at the commencement of this Act a registrar of or an officer in any of the said local registries, suffers any loss of fees or emoluments by reason of the business in such registry being diminished in consequence of this Act, he may petition the Commissioners of Her Majesty's Treasury for compensation, and the Commissioners of Her Majesty's Treasury shall inquire whether any, and if any, what compensation ought to be made to the petitioner, regard being had to the conditions on which his appointment was made, the nature of his office, the duration of his service, the character of his fees or emoluments, and all the circumstances of the case. The petitioner shall render to the Commissioners of Her Majesty's Treasury such account of the fees and emoluments received by him during any period not exceeding five years before the passing of this Act, and during such period before the date of his petition, and give such information as the Commissioners of Her Majesty's Treasury may require for the purpose of enabling them to ascertain whether the petitioner has suffered the loss alleged by him, and whether any, and if any, what compensation ought to be made to him.

If the Commissioners of Her Majesty's Treasury think that the claim of the petitioner to compensation is established, they may award to him, out of moneys to be provided by Parliament, such compensation, by annuity or otherwise, as under the circumstances of the case they think just and reasonable.

Repeal.

Repeal of 37 & 38 Vict. c. 78, s. 7.

129. The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act.

a conveyancing Act. 1881, s. 73.

SETTLED ESTATES.

40 & 41 Vict. c. 18.

[40 & 41 VICT. CH. 18.]

ARRANGEMENT OF CLAUSES.

Clauses.

1. Short title.
2. Interpretation of "settlement" and "settled estates."
3. Interpretation of "the Court."
4. Power to authorise leases of settled estates.
5. Leases may contain special covenants.
6. Parts of settled estates may be leased.
7. Leases may be surrendered and renewed.
8. Power to authorise leases to extend to preliminary contracts.
9. Powers of leasing to include powers to lords of settled manors to give licenses to their copyhold or customary tenants to grant leases.
10. Mode in which leases may be authorised.
11. What evidence to be produced on an application to authorise leases.
12. After approval of a lease, Court to direct who shall be the lessor.
13. Powers of leasing may be vested in trustees.
14. Conditions that leases be settled by the Court not to be inserted in orders made under this Act.
15. Conditions where inserted may be struck out.
16. Court may authorise sales of settled estates and of timber.
17. Proceedings for protection.
18. Consideration for land sold for building may be a fee-farm rent.
19. Minerals, &c., may be excepted from sales.
20. Court may authorise dedication of any part of settled estates for streets, roads, and other works.
21. As to laying out and making and executing and maintaining streets, roads, and other works, and expenses thereof.
22. How sales and dedications are to be effected under the direction of the Court.
23. Application by petition to exercise powers conferred by this Act.
24. With whose consent such application to be made.
25. Court may dispense with consent in respect of certain estates.
26. Notice to be given to persons who do not consent to or concur in the application.
27. Court may dispense with notice under certain circumstances.
28. Court may dispense with consent, having regard to the number and interests of parties.
29. Petition may be granted without consent, saving rights of non-consenting parties.
30. Notice of application to be served on all trustees, &c.
31. Notice of application to be given in newspapers, if Court direct.
32. No application under this Act to be granted where a similar application has been rejected by Parliament.
33. Notice of the exercise of powers to be given as directed by the Court.
34. Payment and application of moneys arising from sales or set aside out of rent, &c., reserved on mining leases.
35. Trustees may apply moneys in certain cases without application to Court.

40 & 41 Vict. c. 18.

Clauses.

36. Until money can be applied to be invested, and dividends to be paid to parties entitled.
37. Court may direct application of money in respect of leases or reversions as may appear just.
38. Court may exercise powers repeatedly, but may not exercise them if expressly negatived.
39. Court not to authorise any Act which could not have been authorised by the settlor.
40. Acts of the Court in professed pursuance of this Act not to be invalidated.
41. Costs.
42. Rules and orders.
43. Rules and orders to be laid before Parliament.
44. Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.
45. Application for lease or sale in Ireland may be made to Landed Estates Court.
46. Tenants for life, &c., may grant leases for twenty-one years.
47. Against whom such leases shall be valid.
48. Evidence of execution of counterpart lease by lessee.
49. Provision as to infants, lunatics, &c.
50. A married woman applying to the Court or consenting to be examined apart from her husband.
51. Examination of married woman how to be made when residing within the jurisdiction of the Court, and how when residing without such jurisdiction.
52. As to application by or consent of married women, whether of full age or under age.
53. No obligation to make or consent to application, &c.
54. Tenants for life, &c., to be deemed entitled notwithstanding incumbrances.
55. Exception as to entails created by Act of Parliament.
56. Saving rights of lords of manors.
57. To what settlements this Act to extend.
58. Repeal of Acts specified in schedule.
59. Saving.
60. Extent of Act.
61. Commencement of Act.
SCHEDULE.

An Act to consolidate and amend the Law relating to Leases and Sales of Settled Estates. [28th June, 1877.]

WHEREAS it is expedient to consolidate and amend the law relating to leases and sales of settled estates:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as "The Settled Estates Act, 1877."

Interpretation of "settlement" and

2. The word "settlement" as used in this Act shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which

any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.

"settled estates."

The term "settled estates" as used in this Act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.

Interpretation of "the Court."

3. The expression "the Court" in this Act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this Act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an Act of Parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.

The expression "the Court" in this Act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.

Power to authorise leases of settled estates.

4. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to

40 & 41 Vict. c. 18.

the inheritance to grant such a lease for a longer term than the term herein-before specified in that behalf:

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease:

Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as herein-after mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient:

Fourthly. No such lease shall authorise the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

Leases may contain special covenants.

5. Subject and in addition to the conditions herein-before mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise.

Parts of settled estates may be leased.

6. The power to authorise leases conferred by this Act shall extend to authorise leases of the whole or any parts of the settled estates, and may be exercised from time to time.

Leases may be surrendered and renewed.

7. Any leases, whether granted in pursuance of this Act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorise leases conferred by this Act shall extend to authorise new leases of the whole or any part of the hereditaments comprised in any surrendered lease.

Power to authorise leases to extend to preliminary contracts.

8. The power to authorise leases conferred by this Act shall extend to authorise preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases.

9. All the powers to authorise and to grant leases contained in this Act shall be deemed to include respectively powers to authorise the lords of settled manors and powers to the lords of settled manors to give licenses to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under this Act.

Powers of leasing to include powers to lords of settled manors to give licenses to their copyhold or customary tenants to grant leases.

10. The power to authorise leases conferred by this Act may be exercised by the Court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner herein-after mentioned.

Mode in which leases may be authorised.

11. When application is made to the Court either to approve of a particular lease or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised.

What evidence to be produced on an application to authorise leases.

12. When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

After approval of a lease, Court to direct who shall be the lessor.

13. Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees, it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

Powers of leasing may be vested in trustees.

14. Provided always, that in orders under this Act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorised should be submitted to or be settled by the Court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have

Conditions that leases be settled by the Court not to be inserted in orders made under this Act.

40 & 41 Vict. c. 18.

any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

Conditions where inserted may be struck out.

15. Provided also, that in all cases of orders (whether under this Act or under the corresponding enactment of the Acts hereby repealed) in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order by striking out such condition, and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the Court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient.

Court may authorise sales of settled estates and of timber.

16. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

See, as to conduct of sale by the Court, *In Re Harvey's Settled Estate*, L. R. 21 Ch. D. 123.

Proceedings for protection.

17. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to sanction any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income.

Repealed. *See* Settled Land Act, 1882, ss. 34, 64.

Consideration for land sold for building may be a fee-farm rent.

18. When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

19. On any sale of land any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the Court may deem advisable.

Minerals, &c., may be excepted from sales.

20. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable.

Court may authorise dedication of any part of settled estates for streets, roads, and other works.

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the Court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the Court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the Court shall seem advisable.

As to laying out and making and executing and maintaining streets, roads, and other works, and expenses thereof.

22. On every sale or dedication to be effected as herein-before mentioned the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

How sales and dedications are to be effected under the direction of the Court.

See, as to effect of this in regard to Succession Duty, *In Re Warner's Settled Estates*, L. R. 17 Ch. D. 711.

23. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable

Application by petition to exercise

40 & 41 Vict. c. 18.

powers conferred by this Act.

on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act.

With whose consent such application to be made.

24. Subject to the exceptions herein-after contained, every application to the Court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

Court may dispense with consent in respect of certain estates.

25. Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the Court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant.

Notice to be given to persons who do not consent to or concur in the application.

26. Provided always, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given to such person in such manner as the Court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court.

Court may dispense with notice under certain circumstances.

27. Provided also, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the Court that such notice as aforesaid cannot be given to such person

without expense disproportionate to the value of the subject-matter of the application, then and in any such case the Court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the Court.

Court may dispense with consent having regard to the number and interests of parties.

28. An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom, or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

Petition may be granted without consent, saving rights of non-consenting parties.

29. Provided nevertheless, that it shall be lawful for the Court if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the Court, or whose rights, estate, or interest ought in the opinion of the Court to be excepted.

Notice of application to be served on all trustees, &c.

30. Notice of any application to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the Court ought to be so served, unless the Court shall think fit to dispense with such notice.

Notice of application to be given in newspapers if Court direct.

31. Notice of any application to the Court under this Act shall, if the Court shall so direct, but not otherwise, be inserted in such newspapers as the Court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the Court by motion for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think.

No application under this Act to be granted where a similar application has been rejected by Parliament.

32. The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private Act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the Bill may have been referred.

40 & 41 Vict. c. 18.

Notice of the exercise of powers to be given as directed by the Court.

33. The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the Court to be practicable and expedient for preventing fraud or mistake.

Payment and application of moneys arising from sales or set aside out of rent, &c., reserved on mining leases.

34. All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into Court *ex parte* the applicant in the matter of this Act, and so far as relates to estates in Ireland shall be paid into the Bank of Ireland to the account of the Accountant-General *ex parte* the applicant in the matter of this Act; and such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rentcharge in lieu of tithes, Crown rent, or quit rent.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled.

See section 32 of Settled Land Act, 1882; and, as to application of moneys, *Re Leadbitter*, 30 W. R. 378, and *Re Hoare's Settled Estates*, *ib.* 177.

Trustees may apply moneys in certain cases without application to Court.

35. The application of the money in manner aforesaid may, if the Court shall so direct, be made by the trustees (if any) without any application to the Court, or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Until money can be applied to be invested, and dividends to be paid to parties entitled.

36. Until the money can be applied as aforesaid, the same shall be invested as the Court shall direct in some or one of the investments in which cash under the control of the Court is for the time being authorised to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Court may direct application of money in respect of leases or

37. Where any purchase money paid into court under the provisions of this Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court on the petition of any

party interested in such money to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

reversions as may appear just.

38. The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

39. Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors.

Court not to authorise any act which could not have been authorised by the settlor.

40. After the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same, except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with.

Acts of the Court in professed pursuance of this Act not to be invalidated.

See Conveyancing and Law of Property Act, 1881, ss. 70, 71.

41. It shall be lawful for the Court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct.

Costs.

42. General rules and orders of Court for carrying into effect the purposes of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers and solicitors of the Court in respect to such matters,

Rules and orders.

40 & 41 Vict. c. 18.

shall be made so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the Court.

See, for England, Settled Estates Act Orders, 1878; for Ireland, Settled Estates Act Orders, 1879.

Rules and orders to be laid before Parliament.

43. All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session, and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.

44. The powers vested in the High Court of Justice by this Act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of Court for the purposes aforesaid, so far as relates to proceedings in the said Court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorised under this Act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine.

Application for lease or sale in Ire-

45. It shall and may be lawful for any person who under the provisions of this Act may make an application to the Court of Chancery in Ireland

40 & 41 Vict. c. 18.

for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned Court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this Act, save that the Judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the Act of the twenty-first and twenty-second years of Her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said Act.

land may be made to Landed Estates Court.

Tenants for life, &c., may grant leases for twenty-one years.

46. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.

Against whom

47. Every demise authorised by the last preceding section shall be

40 & 41 Vict. c. 18.

such leases shall be valid.

valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person, under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

Evidence of execution of counterpart lease by lessee.

48. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act.

Provision as to infants, lunatics, &c.

49. All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this Act may be given to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court.

A married woman applying to the Court, or consenting to be examined apart from her husband.

50. Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

Examination of married woman how to be made when residing within the jurisdiction of the Court, and how when residing without such jurisdiction.

51. The examination of such married woman, when resident within the jurisdiction of the Court to which such application is made, shall be made either by the Court or by some solicitor duly appointed by the Court for that purpose, who shall certify under his hand that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the Court to which such application is made, her examination may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the Court, and such person shall certify under his hand to the effect herein-before provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person

not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court.

As to application by or consent of married women, whether of full age or under age.

52. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

No obligation to make or consent to application, &c.

53. Nothing in this Act shall be construed to create any obligation on any person to make or consent to any application to the Court or to exercise any power.

Tenants for life, &c., to be deemed entitled notwithstanding incumbrances.

54. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

Exception as to entails created by Act of Parliament.

55. Provided always, that nothing in this Act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the Act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other Act of Parliament, the tenants-in-tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Saving rights of lords of manors.

56. Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

To what settlements this Act to extend.

57. This Act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this Act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this Act as if the matter originated under this Act, or may be continued or taken under the Acts hereby repealed, or partly under this Act and partly under the said repealed Acts as occasion may require: Provided always, that the provisions in this Act contained respecting demises to be made without application to the Court shall extend only to settlements made after the first day of November one thousand eight hundred and fifty-six.

Repeal of Acts specified in schedule.

58. The Acts specified in the schedule to this Act are hereby repealed: Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

Saving.

59. Nothing in this Act shall interfere with the exercise of any powers to authorise or grant leases conferred by any Act of Parliament not expressly repealed by this Act.

Extent of Act.

60. This Act shall not extend to Scotland.

40 & 41 Vict. c. 18.

Commencement of Act.

61. This Act shall commence on the first day of November one thousand eight hundred and seventy-seven.

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120 . . .	An Act to facilitate Leases and Sales of Settled Estates.
21 & 22 Vict. c. 77 . . .	An Act to Amend and Extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 . . .	An Act to further Amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 . . .	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 . . .	The Settled Estates Act, 1876.

44 & 45 Vict. c. 41.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

[44 & 45 VICT. CH. 41.]

ARRANGEMENT OF CLAUSES.

I.—PRELIMINARY.

Clauses.

1. Short title; commencement; extent.
2. Interpretation of property, land, &c.

II.—SALES AND OTHER TRANSACTIONS.

Contracts for Sale.

3. Application of stated conditions of sale to all purchases.
4. Completion of contract after death.

Discharge of Incumbrances on Sale.

5. Provision by Court for incumbrances, and sale freed therefrom.

General Words.

6. General words in conveyances of land, buildings, or manor.

Covenants for Title.

7. Covenants for title to be implied. On conveyance for value, by beneficial owner. Right to convey. Quiet enjoyment. Freedom from incumbrance. Further assurance. On conveyance of leaseholds for value, by beneficial owner. Validity of lease. On mortgage, by beneficial owner. Right to convey. Quiet enjoyment. Freedom from incumbrance. Further assurance. On mortgage of leaseholds, by beneficial owner. Validity of lease. Payment of rent and performance of covenants. On settlement. For further assurance, limited. On conveyance by trustee or mortgagee. Against incumbrances.

Execution of Purchase Deed.

Clauses.
8. Rights of purchaser as to execution.

Production and Safe Custody of Title Deeds.

9. Acknowledgment of right to production, and undertaking for safe custody of documents.

III.—LEASES.

10. Rent and benefit of lessees' covenants to run with reversion.
11. Obligation of lessors' covenants to run with reversion.
12. Apportionment of conditions on severance, &c.
13. On sub-demise, title to leasehold reversion not to be required.

Forfeiture.

14. Restrictions on and relief against forfeiture of leases.

IV.—MORTGAGES.

15. Obligation on mortgagee to transfer instead of re-conveying.
16. Power for mortgagor to inspect title deeds.
17. Restriction on consolidation of mortgages.

Leases.

18. Leasing powers of mortgagor and of mortgagee in possession.

Sale; Insurance; Receiver; Timber.

19. Powers incident to estate or interest of mortgagee.
20. Regulation of exercise of power of sale.
21. Conveyance, receipt, &c., on sale.
22. Mortgagee's receipts, discharges, &c.
23. Amount and application of insurance money.
24. Appointment, powers, remuneration, and duties of receiver.

Action respecting Mortgage.

25. Sale of mortgaged property in action for foreclosure, &c.

V.—STATUTORY MORTGAGE.

26. Form of statutory mortgage in schedule.
27. Forms of statutory transfer of mortgage in schedule.
28. Implied covenants, joint and several.
29. Form of re-conveyance of statutory mortgage in schedule.

VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

30. Devolution of trust and mortgage estates on death.

VII.—TRUSTEES AND EXECUTORS.

31. Appointment of new trustees, vesting of trust property, &c.
32. Retirement of trustee.
33. Powers of new trustee appointed by Court.
34. Vesting of trust property in new or continuing trustees.
35. Power for trustees for sale to sell by auction, &c.
36. Trustees' receipts.
37. Power for executors and trustees to compound, &c.
38. Powers to two or more executors or trustees.

44 & 45 Vict. c. 41.

VIII.—Married Women.

Clauses.
39. Power for Court to bind interest of married woman.
40. Power of attorney of married woman.

IX.—Infants.

41. Sales and leases on behalf of infant owner.
42. Management of land and receipt and application of income during minority.
43. Application by trustees of income of property of infant for maintenance, &c.

X.—Rentcharges and other Annual Sums.

44. Remedies for recovery of annual sums charged on land.
45. Redemption of quit-rents and other perpetual charges.

XI.—Powers of Attorney.

46. Execution under power of attorney.
47. Payment by attorney under power without notice of death, &c., good.
48. Deposit of original instruments creating powers of attorney.

XII.—Construction and Effect of Deeds and other Instruments.

49. Use of word grant unnecessary.
50. Conveyance by a person to himself, &c.
51. Words of limitation in fee or in tail.
52. Powers simply collateral.
53. Construction of supplemental or annexed deed.
54. Receipt in deed sufficient.
55. Receipt in deed or indorsed, evidence for subsequent purchaser.
56. Receipt in deed or indorsed, authority for payment to solicitor.
57. Sufficiency of forms in Fourth Schedule.
58. Covenants to bind heirs, &c.
59. Covenants to extend to heirs, &c.
60. Effect of covenant with two or more jointly.
61. Effect of advance on joint account, &c.
62. Grants of easements, &c., by way of use.
63. Provision for all the estate, &c.
64. Construction of implied covenants.

XIII.—Long Terms.

65. Enlargement of residue of long term into fee simple.

XIV.—Adoption of Act.

66. Protection of solicitor and trustees adopting Act.

XV.—Miscellaneous.

67. Regulations respecting notice.
68. Short title of 5 & 6 Will. IV. c. 62.

XVI.—Court; Procedure; Orders.

69. Regulations respecting payments into Court and applications.
70. Orders of Court conclusive.

XVII.—REPEALS.

Clauses.
71. Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

XVIII.—IRELAND.

72. Modifications respecting Ireland.
73. Death of bare trustee intestate, &c.

SCHEDULES.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. [22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

Interpretation of property, land, &c.

2. In this Act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor,

44 & 45 Vict. c. 41.

or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

See s. 3 (8), *post*.

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document, include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

II.—Sales and other Transactions.

44 & 45 Vict. c. 41.

Contracts for Sale.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

See s. 13, *post*; Vendor and Purchaser Act, 1874, s. 2, § 1; and Conveyancing Act, 1882, s. 4.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

44 & 45 Vict. c. 41.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

See Conveyancing Act, 1882, s. 2.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

See s. 2 (viii.), *ante*.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

See ss. 30 & 47, *post*.

Discharge of Incumbrances on Sale.

44 & 45 Vict. c. 41.

Provision by Court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

See, as to order, *Dickin* v. *Dickin*, W. N. (1882), 113, 30 W. R. 887; and *Patching* v. *Ball*, *ib.*, 244, & 46 L. T. 227.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

General Words.

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections,

44 & 45 Vict. c. 41.

fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On conveyance for value, by

(A.) In a conveyance for valuable consideration, other than a mort-

gage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring

beneficial owner.

Right to convey.

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

44 & 45 Vict. c. 41.

the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On conveyance of leaseholds for value, by beneficial owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

On mortgage, by beneficial owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

Right to convey.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed ;

Quiet enjoyment.

and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made ;

Freedom from incumbrance.

and that, freed and discharged from, or otherwise by the person who so conveys suffi-

ciently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Further assurance.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage of leaseholds, by beneficial owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Validity of lease.

Payment of rent and performance of covenants.

44 & 45 Vict. c. 41.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

On settlement. For further assurance, limited.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee,

or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance. 44 & 45 Vict. c. 41.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this Act.

Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this Act.

See s. 56, *post*.

Production and Safe Custody of Title Deeds.

Acknowledgment of right to production, and undertaking for safe custody of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from

44 & 45 Vict. c. 41.

time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

Act applied, enfranchisement
Barclays Bank v. Wilkinson
W.N. 1884.
25 Ch D 320.

44 & 45 Vict. c. 41.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

III.—Leases.

Rent and benefit of lessees' covenants to run with reversion.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

44 & 45 Vict. c. 41.

Obligation of lessors' covenants to run with reversion.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

On sub-demise, title to leasehold reversion not to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

See s. 3 (1), *ante;* Vendor and Purchaser Act, 1874, s. 2, § 1; and Conveyancing Act, 1882, s. 4.

Forfeiture.

Restrictions on and relief against forfeiture of leases.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to

make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. 44 & 45 Vict. c. 41.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

See, as to extending to breaches before 1882, *Quilter* v. *Mapleson*, L. R. 9 Q. B. D. 672.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines or other things, or to enter or inspect the mine or the workings thereof.

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

44 & 45 Vict. c. 41.

IV.—Mortgages.

Obligation on mortgagee to transfer instead of reconveying.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See, as to application of this section, *Teevan* v. *Smith*, L. R. 20 Ch. D. 724; extended by Conveyancing Act, 1882, s. 12.

Power for mortgagor to inspect title deeds.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Leases.

Leasing powers of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf. 44 & 45 Vict. c. 41.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

See ss. 10, 11, *ante*.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

In re Nugent & Riley's Contract 1 W. C. 78/147.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

44 & 45 Vict. c. 41.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Sale; Insurance; Receiver; Timber.

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such

cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

Regulation of exercise of power of sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service ; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due ; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

See s. 18 (11), *ante*.

Conveyance, receipt, &c., on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage ; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to

44 & 45 Vict. c. 41.

meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagees' receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

See s. 19 (iii.), *ante*.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

44 & 45 Vict. c. 41.

(8.) The receiver shall apply all money received by him as follows (namely) :

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property ; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage :

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

Action respecting Mortgage.

Sale of mortgaged property in action for foreclosure, &c.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed. 44 & 45 Vict. c. 41.

(7.) This section does not extend to Ireland. 15 & 16 Vict. c. 86, s. 48.

See, as to the order under this section, and when it will be made, *Union Bank of London* v. *Ingram*, L. R. 20 Ch. D. 463; *Woolley* v. *Colman*, L. R. 21 Ch. D. 169; *Wade* v. *Wilson*, L. R. 22 Ch. D. 235: *Weston* v. *Davidson*, W. N. (1882), 28; *Cripps* v. *Wood*, 51 L. J. Ch. 584; *Gibbs* v. *Haydon*, 47 L. T. 184, and 30 W. R. 726.

V.—Statutory Mortgage.

Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of

44 & 45 Vict. c. 41.

all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Form of reconveyance of statutory mortgage in schedule.

29. A reconveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

VI.—Trust and Mortgage Estates on Death.

Devolution of trust and mortgage estates on death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary

disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

37 & 38 Vict. c. 78.

38 & 39 Vict. c. 87.

VII.—Trustees and Executors.

Appointment of new trustees, vesting of trust property, &c.

31.—(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

See, as to Court not appointing where this power can be exercised, *In re J. Gibbon's Trusts*, W. N. (1882), 12, 46 L. T. 756, and 30 W. R. 287.

(2.) On an appointment of a new trustee, the number of trustees may be increased.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

44 & 45 Vict. c. 41.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

Cecil v Langdon W.N. '84. 195.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this Act.

See Conveyancing Act, 1882, s. 5.

Retirement of trustee.

32.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

Powers of new trustee appointed by Court.

Cecil v Langdon 25 Ch. D.

33.—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(2.) This section applies to appointments made either before or after the commencement of this Act.

Vesting of trust property in new or

34.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any

chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

continuing trustees.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

See *In re Harrison's Settlement Trusts*, W. N. (1883), 31.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

Power for trustees for sale to sell by auction, &c.

35.—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

Trustees' receipts.

36.—(1.) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

See Settled Land Act, 1882, s. 40

44 & 45 Vict. c. 41.

(2.) This section applies to trusts created either before or after the commencement of this Act.

See, for instance of application, *In re Thomas's Settlement*, W. N. (1882), 7.

Power for executors and trustees to compound, &c.

37.—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

See, as to effect of section, *Re Owens*, 47 L. T. 61 (C. A.).

Powers to two or more executors or trustees.

38.—(1.) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.

VIII.—Married Women.

Power for Court to bind interest of married woman.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

See, for instance of application, *Hodges* v. *Hodges*, L. R. 20 Ch. D. 749; as to title of petition under Settled Estates Act, 1877, *Re Landfield*, 46 L. T. 227, 30 W. R. 377; as to effect of the section, *Tamplin* v. *Miller*, 30 W. R. 422.

Power of attorney of

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed,

to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto. 44 & 45 Vict. c. 41. married woman.

(2.) This section applies only to deeds executed after the commencement of this Act.

See Conveyancing Act, 1882, ss. 7. 8; and *post*, ss. 46 *et seq.*

IX.—Infants.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877. Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

See Settled Land Act, 1882. s. 59; and, for instance of application, *In re Liddell*, W. N. (1882), 183.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply. Management of land and receipt and application of income during minority.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and

44 & 45 Vict. c. 41.

all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

Consider Re Buckley's trusts 44 Ch D 83 (see Re Hotchpot 2 Ch. 449 note).

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

Application by trustees of income of

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely,

or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

property of infant for maintenance, &c.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

X.—Rentcharges and other Annual Sums.

Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment

44 & 45 Vict. c. 41.

thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by nonpayment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by nonpayment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

Redemption of quit rents and other perpetual charges.

45.—(1.) Where there is a quit rent, chief rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolue discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and

every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

XI.—Powers of Attorney.

Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute, or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2). This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

See s. 40, *ante*.

Payment by attorney under power without notice of death, &c., good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

See Conveyancing Act, 1882, ss. 8, 9.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the

44 & 45 Vict. c. 41.

office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

See Rules, *post*, p. 501.

XII.—Construction and Effect of Deeds and other Instruments.

Use of word grant unnecessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this Act.

Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

Powers simply collateral.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

See Conveyancing Act, 1882, s. 6. Jur Eqs Wms (13) 43

Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by

way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

See s. 8, *ante*; and, as to effect of these two sections, *In re Bellamy & Tylden and The Metropolitan Board of Works*, W. N. (1882), 165. And as to S.C. on appeal W.N. (1883) 121, 24 Ch.D. 387; and Thomas Mort, &c. v. Ivory (1886) 55 L.T. 592.

Sufficiency of forms in Fourth Schedule.

57. Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

Covenants to bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

See ss. 10, 11, *ante*.

44 & 45 Vict. c. 41.

Covenants to extend to heirs, &c.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of advance on joint account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have

effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

Grants of easements, &c., by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

See 13 Vict. c. 21, s. 4.

XIII.—Long Terms.

Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

44 & 45 Vict. c. 41.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants, and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act. 44 & 45 Vict. c. 41.

See Conveyancing Act, 1882, s. 11.

XIV.—Adoption of Act.

Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

XV.—Miscellaneous.

Regulations respecting notice.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required

44 & 45 Vict. c. 41.

or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the Court.

Short title of 5 & 6 Will. IV. c. 62.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.

XVI.—Court; Procedure; Orders.

Regulations respecting payments into Court and applications.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

See In re Lillwall's Settlement, W. N. (1882), 6, and 30 W. R. 243.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

39 & 40 Vict. c. 59, s. 17.

(8.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of

Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Orders of Court conclusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

40 & 41 Vict. c. 18, s. 40.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

See, as to effect of this section, *In re Hall Dare's Contract*, L. R. 21 Ch. D. 41.

XVII.—Repeals.

Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

See s. 70, *ante*.

XVIII.—Ireland.

Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery

44 & 45 Vict. c. 41.

Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

40 & 41 Vict. c. 57, s. 69.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Death of bare trustee intestate, &c. 37 & 38 Vict. c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE.

ACTS AFFECTED.

PART I.

(*See* Conveyancing Act, 1882, s. 2.)

1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

PART II.

(*See* s. 68, *ante*.)

5 & 6 Will. IV. c. 62.—An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations

taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths. 44 & 45 Vict. c. 41.

THE SECOND SCHEDULE.

REPEALS.

(*See* ss. 14, 25, 71, *ante*.)

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35 . in part.	An Act to further amend the law of property and to relieve trustees . Sections four to nine.	in part; namely,—
23 & 24 Vict. c. 126 . in part.	The Common Law Procedure Act, 1860 . . . . . Section two.	in part; namely,—

PART II.

15 & 16 Vict. c. 86 . in part.	An Act to amend the practice and course of proceeding in the High Court of Chancery . . . Section forty-eight.	in part; namely,—

PART III.

8 & 9 Vict. c. 119 .	An Act to facilitate the conveyance of real property.	
23 & 24 Vict. c. 145 . in part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills . Parts II. and III. (sections eleven to thirty).	in part; namely,—

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I.

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of

44 & 45 Vict. c. 41.

which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A* of [*&c.*] of the 1st part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and

by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

*** *Variations as noted above.*

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons

44 & 45 Vict. c. 41.

claiming under him re-convey the premises to *A.* or the persons claiming under him AND *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the 1st part *B.* of [*&c.*] and *C.* of [*&c.*] of the 2nd part and *M.* of [*&c.*] of the 3rd part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [&c.] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the 1st part *Jane S.* of [*&c.*] of the 2nd part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the 3rd part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* Al that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in

fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple [*Insert trusts of term of* 500 *years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

44 & 45 Vict. c. 41.

In witness &c.

CONVEYANCING ACT, 1882.

45 & 46 Vict. c. 39.

[45 & 46 VICT. CH. 39.]

ARRANGEMENT OF CLAUSES.

Preliminary.

Clauses.

1. Short titles; commencement; extent; interpretation.

Searches.

2. Official negative and other certificates of searches for judgments, Crown debts, &c.

Notice.

3. Restriction on constructive notice.

Leases.

4. Contract for lease not part of title to lease.

Separate Trustees.

5. Appointment of separate sets of trustees.

Powers.

6. Disclaimer of power by trustees.

Married Women.

7. Acknowledgment of deeds by married women.

45 & 46 Vict. c. 39.

Powers of Attorney.

Clauses.

8. Effect of power of attorney, for value, made absolutely irrevocable.
9. Effect of power of attorney, for value or not, made irrevocable for fixed time.

Executory Limitations.

10. Restriction on executory limitations.

Long Terms.

11. Amendment of enactment respecting long terms.

Mortgages.

12. Re-conveyance on mortgage.

Saving.

13. Restriction on repeals in this Act.

SCHEDULE.

An Act for further improving the Practice of Conveyancing; and for other purposes. [10th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short titles; commencement; extent; interpretation.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881) and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

44 & 45 Vict. c. 41.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

(4.) In this Act and in the Schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

3 & 4 Will. IV. c. 74.

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of "Fines and Recoveries, and for the substitution of more simple "modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition "of Fines and Recoveries, and for the substitution of more simple

4 & 5 Will. IV. c. 92.

"modes of Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act. 45 & 46 Vict. c. 39.

Searches.

Official negative and other certificates of searches for judgments, crown debts, &c.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General Rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which Rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act. 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanor.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

45 & 46 Vict. c. 39.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

3 & 4 Will. IV. c. 74.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule.

(12.) This section does not extend to Ireland.

See Conveyancing Act, 1881, s. 3 (6); and see Rules, *post.* p. 560

Notice.

Restriction on constructive notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

Leases.

Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the

deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease. 45 & 46 Vict. c. 39.

(2.) This section applies to leases made either before or after the commencement of this Act.

See Vendor and Purchaser Act, 1874, s. 2, § 1; and Conveyancing Act, 1881, ss. 3 (1), 13.

Separate Trustees.

Appointment of separate sets of trustees.

5.—(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

(2.) This section applies to trusts created either before or after the commencement of this Act.

See Conveyancing Act, 1881, s. 31.

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Married Women.

(*See* Conveyancing Act, 1881, Part viii.)

Acknowledgment of deeds by married women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the "perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

45 & 46 Vict. c. 39.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorised to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a County Court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment, but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed rules of Court within the Supreme Court of Judicature Act (Ireland) 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68. 40 & 41 Vict. c. 57.

(4.) The enactments described in the schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for

the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers. 45 & 46 Vict. c. 39.

See Rules, *post*.

Powers of Attorney.

(*See* Conveyancing Act, 1881, ss. 40, 46, 47.)

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

45 & 46 Vict. c. 39.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Executory Limitations.

Restriction on executory limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

See Conveyancing Act, 1881, s. 65.

Mortgages.

Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

See Conveyancing Act, 1881, s. 15.

Saving.

Restriction on repeals in this Act.

13. The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending

or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act. 45 & 46 Vict. c. 39.

SCHEDULE.

REPEALS. Section 7 (4).

3 & 4 Will. IV. c. 74 . in part.	The Fines and Recoveries Act . in part; namely,— Section eighty-four, from and including the words "and the same Judge," to the end of that section. Sections eighty-five to eighty-eight, inclusive.
4 & 5 Will. IV. c. 92 . in part.	The Fines and Recoveries (Ireland) Act . . . . . } in part; namely,— Section seventy-five, from and including the words "and the same Judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75 .	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23 .	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

SETTLED LAND ACT, 1882.

45 & 46 Vict. c. 38.

[45 & 46 VICT. CH. 38.]

amended 47 & 48 Vict. c. 18.

ARRANGEMENT OF CLAUSES.

I.—PRELIMINARY.

Clauses.

1. Short title; commencement; extent.

II.—DEFINITIONS.

2. Definition of settlement, tenant for life, &c.

III.—SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

General Powers and Regulations.

3. Powers to tenant for life to sell, &c.
4. Regulations respecting sale, enfranchisement, exchange, and partition.

45 & 46 Vict. c. 38.

Special Powers.

Clauses.

5. Transfer of incumbrances on land sold, &c.

IV.—Leases.

General Powers and Regulations.

6. Power for tenant for life to lease for ordinary or building or mining purposes.
7. Regulations respecting leases generally.

Building and Mining Leases.

8. Regulations respecting building leases.
9. Regulations respecting mining leases.
10. Variation of building or mining lease according to circumstances of district.
11. Part of mining rent to be set aside.

Special Powers.

12. Leasing powers for special objects.

Surrenders.

13. Surrender and new grant of leases.

Copyholds.

14. Power to grant to copyholders licences for leasing.

V.—Sales, Leases, and other Dispositions.

Mansion and Park.

15. Restriction as to mansion house, park, &c.

Streets and Open Spaces.

16. Dedication for streets, open spaces, &c.

Surface and Minerals apart.

17. Separate dealing with surface and minerals with or without wayleaves, &c.

Mortgage.

18. Mortgage for equality, money, &c.

Undivided Share.

19. Concurrence in exercise of powers as to undivided share.

Conveyance.

20. Completion of sale, lease, &c., by conveyance.

VI.—Investment or other Application of Capital Trust Money.

21. Capital money under Act ; investment, &c., by trustees or Court.
22. Regulations respecting investment, devolution, and income of securities, &c.
23. Investment in land in England.
24. Settlement of land purchased, taken in exchange, &c.

VII.—Improvements.

Improvements with Capital Trust Money.

25. Description of improvements authorised by Act.
26. Approval by Land Commissioners of scheme for improvement and payment thereon.
27. Concurrence in improvements.
28. Obligation on tenant for life and successors to maintain, insure, &c.

Execution and Repair of Improvements. 45 & 46 Vict. c. 38.

Clauses.

29. Protection as regards waste in execution and repair of improvements.

Improvement of Land Act, 1864.

30. Extension of 27 & 28 Vict. c. 114, s. 9.

VIII.—CONTRACTS.

31. Power for tenant for life to enter into contracts.

IX.—MISCELLANEOUS PROVISIONS.

32. Application of money in Court under Lands Clauses and other Acts.
33. Application of money in hands of trustees under powers of settlement.
34. Application of money paid for lease or reversion.
35. Cutting and sale of timber, and part of proceeds to be set aside.
36. Proceedings for protection or recovery of land settled or claimed as settled.
37. Heirlooms.

X.—TRUSTEES.

38. Appointment of trustees by Court.
39. Number of trustees to act.
40. Trustees' receipts.
41. Protection of each trustee individually.
42. Protection of trustees generally.
43. Trustees' reimbursement.
44. Reference of differences to Court.
45. Notice to trustees.

XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

46. Regulations respecting payments into Court, applications, &c.
47. Payment of costs out of settled property.
48. Constitution of Land Commissioners; their powers, &c.
49. Filing of certificates, &c., of Commissioners.

XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

50. Powers not assignable; contract not to exercise powers void.
51. Prohibition or limitation against exercise of powers void.
52. Provision against forfeiture.
53. Tenant for life trustee for all parties interested.
54. General protection of purchasers, &c.
55. Exercise of powers; limitation of provisions, &c.
56. Saving for other powers.
57. Additional or larger powers by settlement.

XIII.—LIMITED OWNERS GENERALLY.

58. Enumeration of other limited owners to have powers of tenant for life.

XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

59. Infant absolutely entitled to be as tenant for life.
60. Tenant for life, infant.
61. Married woman, how to be affected.
62. Tenant for life, lunatic.

XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

63. Provision for case of trust to sell and re-invest in land.

45 & 46 Vict. c. 38.

XVI.—Repeals.
Clauses.
64. Repeal of enactments in schedule.

XVII.—Ireland.
65. Modifications respecting Ireland.
Schedule.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.

[10th August, 1882.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I.—Preliminary.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

II.—Definitions.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

(4.) The determination of the question whether land is settled land,

for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is

45 & 46 Vict. c. 38.

a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

(xi.) Person includes corporation.

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

Powers to tenant for life to sell, &c.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained. Wheeler v. Walker W.N. '83. 134. 23 Ch.D. 752

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

Implied warranty of title by trustee for sale. Re Marsden's Trusts 26 Ch.D. 552.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

Special Powers.

Transfer of incumbrances on land sold, &c.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

IV.—Leases.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years :

(ii.) In case of a mining lease, sixty years :

(iii.) In case of any other lease, twenty-one years.

Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

45 & 46 Vict. c. 38.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

Building and Mining Leases.

Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

Regulations respecting mining leases.

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes.

Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

See Rules, *post*.

Part of mining rent to be set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Special Powers.

Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(iii.) A lease for confirming, as far as may be, a previous lease, being

45 & 46 Vict. c. 38.

void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—Sales, Leases, and other Dispositions.

Mansion and Park.

Restriction as to mansion house, park, &c.

15. Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for

life, without the consent of the trustees of the settlement, or an order of the Court. 45 & 46 Vict. c. 38.

See Rules, *post*.

Streets and open Spaces.

Dedication for streets, open spaces, &c.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith ; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required ; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Surface and Minerals apart.

Separate dealing with surface and minerals, with or without way-leaves, &c.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

Mortgage.

Mortgage for

45 & 46 Vict. c. 38

equality money, &c.

exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

Conveyance.

Completion of sale, lease, &c., by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is

sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to shew the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

45 & 46 Vict. c. 38.

VI.—Investment or other Application of Capital Trust Money.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

Capital money under Act; investment, &c., by trustees or Court.

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities:

See Rules, *post*.

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

(iii.) In payment for any improvement authorized by this Act:

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary

45 & 46 Vict. c. 38.

land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act. 45 & 46 Vict. c. 38.

Investment in land in England.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Settlement of land purchased, taken in exchange, &c.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights and privileges over and in relation to land.

45 & 46 Vict. c. 38.

VII.—Improvements.

Improvements with Capital Trust Money.

Description of improvements authorized by Act.

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not:

(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market-places:

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being

necessary or proper in connexion with the conversion of land into building land :

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid :

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines :

(xx.) Reconstruction, enlargement, or improvement of any of those works.

Approval by Land Commissioners of scheme for improvement and payment thereon.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof ; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid ; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

Concurrence in improvements.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

Obligation on tenant for life and successors to maintain, insure, &c.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commis-

45 & 46 Vict. c. 38.

sioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Improvement of Land Act, 1864.

45 & 46 Vict. c. 38.

Extension of 27 & 28 Vict. c. 114, s. 9.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

VIII.—CONTRACTS.

Power for tenant for life to enter into contracts.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a

45 & 46 Vict. c. 38.

lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

IX.—Miscellaneous Provisions.

Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18. 23 & 24 Vict. c. 106. 32 & 33 Vict. c. 18. 40 & 41 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

Application of money in hands of trustees under powers of settlement.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

See Lands Clauses Consolidation Act, 1845, s. 74, and Settled Estates Act, 1877, s. 37. *See* Rules, *post*.

Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Proceedings for protection or recovery of land settled or claimed as settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

The above section is in place of s. 17 of Settled Estates Act, 1877.

Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

X.—Trustees.

Appointment of trustees by Court.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

See Rules, *post*; and *Wheelwright* v. *Walker*, W. N. (1883), 30.

45 & 46 Vict. c. 38.

Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Trustees receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

Trustees reimbursement.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Reference of differences to Court.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court

may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

See Rules, *post*.

Notice to trustees.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

See, as to sale by tenant for life after sale by reversioner, there being no trustees, *Wheelwright* v. *Walker*, W. N. (1883), 30, 104, 154.

XI.—Court; Land Commissioners; Procedure.

Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

(7.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

45 & 46 Vict. c. 38.

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(9.) General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

Payment of costs out of settled property.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

Constitution of Land Commissioners; their powers, &c.

48.—(1.) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

(2.) The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of

any power or duty under any Act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other. 45 & 46 Vict. c. 38.

(3.) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them.

(4.) All Acts of Parliament, judgments, decrees, or orders of any court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

(5.) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them. 27 & 28 Vict. c. 114.

49.—(1) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office. Filing of certificates, &c., of Commissioners.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on pay-

45 & 46 Vict. c. 38.

ment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—Restrictions, Savings, and General Provisions.

Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period

for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

Provision against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

General protection of purchasers, &c.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

Exercise of powers; limitation of provisions, &c.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power, is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

Saving for other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power

45 & 46 Vict. c. 38.

conferred by the settlement exerciseable for any purpose provided for in this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

XIII.—Limited Owners generally.

Enumeration of other limited owners, to have powers of tenant for life.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust

for accumulation of income for payment of debts or other purpose :

(vii.) A tenant in tail after possibility of issue extinct :

(viii.) A tenant by the curtesy :

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

XIV.—Infants ; Married Women : Lunatics.

Infant absolutely entitled to be as tenant for life.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

See Conveyancing Act, 1881, s. 41.

Tenant for life, infant.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Married woman, how to be affected.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and

45 & 46 Vict. c. 38.

her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

Tenant for life, lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

XV.—Settlement by way of Trusts for Sale.

Provision for case of trust to sell and re-invest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of

consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as

45 & 46 Vict. c. 38.

circumstances permit, but so as not to increase or multiply charges or powers of charging.

~~See *Thomas v. Williams*, W. N. (1883), 58.~~

XVI.—Repeals.

Repeal of enactments in schedule.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

XVII.—Ireland.

Modifications respecting Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

40 & 41 Vict. c. 57.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

40 & 41 Vict. c. 56.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil

Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act. 45 & 46 Vict. c. 38.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

S. 64.

	REPEALS.	
23 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills . .	in part; namely,—
	Parts I. and IV. (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).	
27 & 28 Vict. c. 114. in part.	The Improvement of Land Act, 1864 - in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.	
40 & 41 Vict. c. 18. in part.	The Settled Estates Act, 1877 -	in part; namely,— Section seventeen.

45 & 46 Vict. c. 75.

MARRIED WOMEN'S PROPERTY ACT, 1882.

[45 & 46 VICT. CH. 75.]

ARRANGEMENT OF CLAUSES.

Clauses.

1. Married woman to be capable of holding property and of contracting as a *feme sole*.
2. Property of a woman married after the Act to be held by her as a *feme sole*.
3. Loans by wife to husband.
4. Execution of general power.
5. Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.
6. As to stock, &c., to which a married woman is entitled.
7. As to stock, &c., to be transferred, &c., to a married woman.
8. Investments in joint names of married women and others.
9. As to stock, &c., standing in the joint names of a married woman and others.
10. Fraudulent investments with money of husband.
11. Moneys payable under policy of assurance not to form part of estate of the insured.
12. Remedies of married woman for protection and security of separate property.
13. Wife's ante-nuptial debts and liabilities.
14. Husband to be liable for his wife's debts contracted before marriage to a certain extent.
15. Suits for ante-nuptial liabilities.
16. Act of wife liable to criminal proceedings.
17. Questions between husband and wife as to property to be decided in a summary way.
18. Married woman as an executrix or trustee.
19. Saving of existing settlements, and the power to make future settlements.
20. Married woman to be liable to the parish for the maintenance of her husband.
21. Married woman to be liable to the parish for the maintenance of her children.
22. Repeal of 33 & 34 Vict. c. 93 ; 37 & 38 Vict. c. 50.
23. Legal representative of married woman.
24. Interpretation of terms.
25. Commencement of Act.
26. Extent of Act.
27. Short title.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-

seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)": 45 & 46 Vict. c. 75.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Married woman to be capable of holding property and of contracting as a *feme sole*.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

Property of a woman married after the Act to be held by her as a *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but

45 & 46 Vict. c. 75.

not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her, as aforesaid.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commence-

ment of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not. 45 & 46 Vict. c. 75.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bylaw, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names of married women and others.

8. All the provisions herein-before contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock, &c., standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commer-

45 & 46 Vict. c. 75.

cial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt

13 & 14 Vict. c. 60.

of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of the law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Husband to be liable for his wife's debts

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the

45 & 46 Vict. c. 75.

Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

contracted before marriage to a certain extent.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district,

or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoy-

In re Stone's Trusts 24 Ch. D. 195

45 & 46 Vict. c. 75.

ment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

31 & 32 Vict. c. 122.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of

any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action. 45 & 46 Vict. c. 75.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three. Commencement of Act.

26. This Act shall not extend to Scotland. Extent of Act.

27. This Act may be cited as the Married Women's Property Act, 1882. Short title.

RULES OF THE SUPREME COURT

AND

ORDER AS TO COURT FEES,

UNDER THE

SETTLED LAND ACT, 1882; CONVEYANCING ACT, 1882; CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

RULES UNDER THE SETTLED LAND ACT, 1882.

Rules. (Settled Land Act.)

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the Court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

3. The forms in the appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

4. The persons to be served with notice of applications to the Court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the Judge directs. The Judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the Judge, any application is to be served.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the Judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorised or directed by the Court under the Act, shall be carried into effect out of Court, unless the Judge shall otherwise order, and generally in such manner as the Judge may direct.

9. Where the Court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the Judge unless the Judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorises any such lease or grant in any particular case, or where the Court authorises a lease under section 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the Judge at chambers without directing the lease or grant to be settled by the Judge.

10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into Court. (Appendix, Forms IX., X., XI.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.

Rules. (Settled Land Act.)

3. The amount of money to be paid into Court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into Court, may contain directions for investment of the money on any securities authorised by section 21, sub-section 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises, is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested.

13. Money paid into Court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.)

14. Any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

15. In all cases not provided for by the Act or these rules, the existing practice of the Court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to Court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
E. FRY, J.

APPENDIX.

Rules. (Settled Land Act.)

FORM I.

TITLE OF PROCEEDINGS.

IN the High Court of Justice,
Chancery Division,
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]

IN the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the will of dated *or as the case may be*].

And in the matter of the Settled Land Act, 1882.

FORM II.

FORMAL PART OF SUMMONS.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of *A.B.*, the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of *A.B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant, by *X.Y.*, his testamentary guardian [*or*, guardian appointed by order dated the , *or*, next friend].

Or, (*c.*) On the part of *C.D.* and *E.F.* the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (*d.*) On the part of *G.H.*, the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A.B.* [*or as the case may be*].

Or, (*e.*) On the part of *I.J.*, the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of *I.J.*, the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or (*g.*) On the part of *I.J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K.L.*, interested under the contract hereinafter mentioned.

Dated the day of 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons (if any) on whom the summons is to be served.*)

Rules. (Settled Land Act.)

FORM III.

SUMMONS UNDER SECTION 10 FOR GENERAL LEASING POWERS.

Title and formal parts as in Forms I. and II. *a.* or *b.*

1. That the applicant [*or in the case of an infant* that the said *X. Y.* during the infancy of the said *A.B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A.B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorised from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sections 7 to 9 of the said Act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

FORM IV.

SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the said *A.B.* [*or X. Y.*] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

FORM V.

SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the applicant [*or* the said *X. Y.*] may be authorised to execute the same.

2. (*Add application for costs as in Form III.* 2.)

FORM VI.

SUMMONS UNDER SECTIONS 15, 35, OR 37 FOR A SALE OUT OF COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the applicant [*or in the case of an infant* the said *X.Y.*] may be authorised to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C.D.* and *E.F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or if this Form is not applicable as in Form III.* 2.

FORM VII.

SUMMONS UNDER SECTIONS 15, 35, OR 37 FOR SALE BY THE COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III.* 2.)

FORM VIII.

AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I of make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A.B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

2. (*If it is the fact.*) The said *A.B.* is an infant of the age of years or thereabouts.

3. *C.D.* of and *E.F.* of are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned Act.

Rules. (Settled Land Act.)

FORM IX.

SUMMONS UNDER SECTION 22 BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *e*.

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase money of the said A. estate (*or as the case may be*) settled by the said settlement [*or* will, &c.].

2. That such directions may be given for the investment of the said sums when paid into Court, and the accumulation or payment of the dividends of the securities representing the same as the Court may think proper.

FORM X.

SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* Section 11).

Title as in Form I.

Formal parts as in Form II. *f*.

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement dated the and made between [*or* the will, &c.] mineral rents under lease dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into Court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into Court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into Court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit and that the dividends on the said when purchased may be paid to *A.B.*, the tenant for life under the above-mentioned settlement during his life or until further order.

FORM XI.

SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY MORTGAGEE (*see* Section 18).

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into Court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or* the will, &c.] and in the matter of the Settled Land

Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2.)

FORM XII.

SUMMONS UNDER SECTION 26 (1).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

FORM XIII.

SUMMONS UNDER SECTION 26 SUB-SECTION (2.) (ii.) FOR APPOINTMENT OF AN ENGINEER OR SURVEYOR.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M.N.* of Engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26 sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XIV.

NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C.D.* of and *E.F.* of the Trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of Engineer [*or* surveyor], for the purposes of section 26 sub-section (2) (ii.) of the said Act.

(Signed) *C.D.*
E.F.

FORM XV.

SUMMONS UNDER SECTION 26 SUB-SECTION (2) (iii.).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *C.D.* and *E.F.* the Trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation* being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C.D.* and *E.F.* under the said Act.

2. (*Add application for costs as in Form III.* 2.)

Rules. (Settled Land Act.)

FORM XVI.

SUMMONS UNDER SECTION 26 SUB-SECTION 3.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the sum of £ may be ordered to be raised out of the in Court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by Order dated the .

2. (*Add application for costs as in Form III.* 2.)

FORM XVII.

SUMMONS UNDER SECTION 31.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.

SUMMONS UNDER SECTION 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest, describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the Court may think fit.

(*Add application for costs as in Form III.* 2.)

FORM XIX.

SUMMONS UNDER SECTION 38 FOR THE APPOINTMENT OF NEW TRUSTEES.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That *G.H.* and *I.J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XX.

SUMMONS UNDER SECTION 44.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).
2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

FORM XXI.

SUMMONS UNDER SECTION 56 FOR ADVICE AND DIRECTION

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the Judge on the following questions :—
1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the Judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III.* 2.)

FORM XXII.

SUMMONS UNDER SECTION 60 FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.

Formal parts as in Form II. *b*.

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.
2. (*Add application for costs as in Form III.* 2.)

FORM XXIII.

SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of 18 .

Rules. (Married Women's Acknowledgments.)

RULES UNDER THE ACT FOR THE ABOLITION OF FINES AND RECOVERIES, AND SECTION 7 OF THE CONVEYANCING ACT, 1882.

1. No person authorised or appointed under the Act 3 & 4 Will. IV. c. 74 (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgments of deeds by married women shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a Commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the Commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the Commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the Commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

"And I declare that I am not interested or concerned either as a "party or as a solicitor or clerk to the solicitor for one of the parties "or otherwise in the transaction giving occasion for the said acknow- "ledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorised to take the acknowledgment :—

(Signed) *A. B.*

A Judge of the High Court of Justice in England,

or A Judge of the County Court of ,

or A perpetual Commissioner for taking acknowledgments of deeds by married women.

or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorised to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special Commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding :—

Charges under the Act 3 & 4 Will. IV. c. 74 (the Fines and Recoveries Act).

	£	s.	d.
For the endorsements on deeds required by the Fines and Recoveries Act, to be entered on the Court Rolls of Manors of the memorandum of production and memorandum of entry on Court Rolls, to be signed by the Lord Steward or Deputy Steward, each indorsement of memorandum 5*s.*, together	0	10	0
For the entries on the Court Rolls of deeds and the indorsements thereon, at per folio of 72 words	0	0	6

Rules. (Married Women's Acknowledgments.)

	£	s.	d.
For taking the consent of each protector of settlement of lands . .	0	13	4
For taking the surrender by each tenant in tail of lands . . .	0	13	4
For entries of such surrenders or the memorandums thereof in the Court Rolls, at per folio of 72 words	0	0	6

9. The following rules and orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto :—

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These rules shall take effect from and after the 31st December, 1882.

Rules. (Searches.)

RULES UNDER SECTION 2 OF THE CONVEYANCING ACT, 1882.

1. Every requisition for an Official Search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the

Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require. **Rules. (Searches.)**

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

RULE UNDER THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

Rules. (Powers of Attorney.)

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the Office.

(Signed) SELBORNE, C. NATH. LINDLEY, L.J.
COLERIDGE, L.C.J. H. MANISTY, J.
G. JESSEL, M.R. EDW. FRY, J.

APPENDIX.

Rules. (Searches.)

FORM I.

DECLARATION BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature,
Central Office.
To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London.

In the matter of *A.B.* and *C.D.*

I declare that the search (*or* searches) in the name (*or* names) of required to be made by the requisition for search, dated the is (*or* are) required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

Signature,
Address, and
Description.

Dated

o o

Rules. (Searches.)

FORM II.

DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

FORM III.

REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE, UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.
Requisition for Search.
To the Clerk of Enrolments,
Royal Courts of Justice,
London.
In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration. Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated

FORM IV.

REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office,
Requisition for Search.
To the Registrar of Bills of Sale,
Royal Courts of Justice.
London.
In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments

registered or re-registered as bills of sale during the period from 18 to 18 both inclusive in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated

FORM V.

REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.
Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women,
Royal Courts of Justice,
London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by Married Women during the period from 18 to 18 both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed, if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated

Rules. (Searches.)

FORM VI.

REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,
Central Office.
Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice, London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules and *lis pendens*, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 to 18 , both inclusive, and for executions for the period from the 29th July 1864 (*or as the case may require*) to the 18 , both inclusive, and for annuities for the period from the 26th April 1855 (*or as the case may require*) to the 18 , both inclusive in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated

FORM VII.

CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,
Central Office,
Enrolment Department.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name (*or* names) of for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name (*or* in any one or more of those names) during the period aforesaid.

or and that except the described in the schedule hereto no deed or document has been enrolled in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated

FORM VIII.

CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office,
Bills of Sale Department.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name (*or* names) of for the period from 18 to 18 both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during that period,

or, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated

FORM IX.

CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,
Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name (*or* names) of for the period from to 18 , both inclusive, for a certificate dated the *or* for certificates o acknowledgment of a deed dated the

or for certificates of acknowledgments of deeds relating to (*fill in the description of the property from the Requisition*)

and that no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 188 .

Rules.
(Searches.)

FORM X.

CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.
The Registry of Judgments.
Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.
In the matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, *lis pendens*, judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 to 18 , both inclusive, and for executions for the period from 18 to 18 , both inclusive, and for annuities for the period from 18 to 18 , both inclusive, in the name (*or* names) of and that no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid searches.

or and that except the mentioned in the schedule hereto, no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.

REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office.
Requisition for continuation of Search.

To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London, W.C.
In the matter of *A.B* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18 , in the name (*or* names) of , from the day of 18 to the day of 18 , both inclusive.

Signature, address, and description of person requiring the search.

Dated

Rules. (Searches.)

FORM XII.

CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, S. 2, TO BE ENDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search (*or* searches) mentioned in the within written certificate has (*or* have) been diligently continued to the day of , 18 , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered, or re-registered, as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name (*or* in any one or more of the within-mentioned names).

Dated

ORDER AS TO COURT FEES.

Court Fees.

1. The following portion of the schedule to the order as to Court Fees made on the 28th October, 1875, is hereby repealed, that is to say:

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
On taking acknowledgment of a deed by a married woman	1	0	0	6	0	0

And instead thereof the following fees shall henceforth be chargeable in respect of the matters herein-after mentioned (namely):

Fees under the Act 3 & 4 *Will. IV. c.* 74. (*the Fines and Recoveries Act*).

	£	s.	d.
For taking the acknowledgment of a married woman by a Judge of the High Court of Justice	1	0	0
To a perpetual Commissioner for taking the acknowledgment of a married woman when not required to go further than a mile from his residence	0	13	4
To a perpetual Commissioner when required to go more than one mile, but not more than three miles, besides his reasonable travelling expenses	1	1	0
To a perpetual Commissioner where the distance exceeds three miles, besides his reasonable travelling expenses	2	2	0
Where more than one married woman at the same time acknowledges the same deed respecting the same property, these fees are to be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property			
To the Clerk of the Peace or his deputy for every search	0	1	0

Court Fees.

	£	s.	d.
To the same for every copy of a list of Commissioners, provided such list shall not exceed the number of 100 names	0	5	0
To the same for every further complete number of 50 names, an additional	0	2	6
For every official copy of a list of Commissioners, provided such list shall not exceed the number of 100 names	0	5	0
For every further complete number of 50 names, additional	0	2	6
For preparing every special commission	1	0	0
For examining the certificate and affidavit, and filing, and indexing the same	0	5	0
Upon the return of a Special Commission to the Central Office	0	5	0
For every search in the registry of certificates of acknowledgments of deeds by married women	0	1	0
For enrolling recognizances, deeds, and other instruments, per folio of 72 words, including the certificate of enrolment endorsed on the instrument, but not including maps, plans, and drawings, which are to be charged at their actual cost	0	1	0
For endorsing a certificate of enrolment on a duplicate of any enrolled instrument, for each folio of the instrument if it does not exceed 24 folios	0	0	6
For the like certificate if the instrument exceeds 24 folios	0	12	0
For office copies of enrolled instruments, per folio of 72 words	0	0	6
For examining copies of enrolled instruments and marking them as office copies, per folio of 72 words	0	0	2

Fees under Section 48 *of the Conveyancing and Law of Property Act*, 1881.

	£	s.	d.
On depositing a power of attorney	0	2	0
On an application to search for a power of attorney so deposited, and inspecting the same, and the affidavit or other documents deposited therewith, for each hour or part of an hour, not exceeding on one day 10*s*.	0	2	6

If an office copy is required, and it exceeds 2*s*. 6*d*., the fee for search and inspection is to be allowed.

Copies of powers of attorney and other documents so deposited presented at the office and stamped or marked as office copies to be charged for as office copies.

2. The following fees, by the order as to Court Fees dated the 6th August, 1880, directed to be inserted in the schedule to the order as to Court Fees made on the 28th October, 1875, are hereby repealed :—

Searches and Inspections.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Inrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments	0	5	0	0	5	0
For every additional name, if included in same certificate	0	2	0	0	2	0
For a duplicate copy of certificate, if not more than three folios	0	1	0	0	1	0

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
For every additional folio	0	0	6	0	0	6
For a continuation search if made within 14 days of date of official certificate (the result to be endorsed on such certificate)	0	1	0	0	1	0

3. Instead of the fees so repealed, the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (viz.):—

Searches and Inspections.

	£	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Enrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments, if not more than five folios	0	5	0
For every additional folio	0	0	6
For every additional name, if included in the same certificate . .	0	2	0
For an office copy of the certificate of search, if not more than three folios	0	1	0
For every additional folio	0	0	6
For a continuation search, if made within one calendar month of date of official certificate (the result to be endorsed on such certificate) . .	0	1	0

4. This order shall come into operation on the 1st January, 1883.

(Signed) CHARLES C. COTES.
HERBERT J. GLADSTONE.
(Lords of the Treasury).

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
EDW. FRY, J.

INDEX.

N.B.—*The matter contained in the Statutes set forth in the Appendix is incorporated with the General Index.*

ABSOLUTE OWNERSHIP,
of property by English Law, only extends to personalty, 17, 38, 82
contrasted with beneficial ownership, 38
allowed in 'estate' of land, 41

ACCUMULATIONS,
of income, 99

ACKNOWLEDGMENT,
of deeds by married women, 114, 501 *et seq.*, 558

ACQUIESCENCE,
effect of, on the operation of Statutes of Limitations, 384

ACTIONS,
real and personal *in rem et in personam*, 2
former practice in real and personal, 2 n. (*g*)
real, abolished by 3 & 4 Wm. IV. c. 27, s. 36, except joint, 3
real, remodelled by Com. L. Proced. Act, 1860, *id.*
respecting mortgages, 181, 182, 368, 472

'ACTUAL DELIVERY,'
meaning of phrase, 77

ADVOWSON,
an incorporeal hereditament, 7, 345 *et seq.*
presentation to by coparceners, joint tenants and tenants in common, 240, 241
distinguished from Next Presentation, 347
title on sale of, 348, 364
concerning purchase of, 348 n. (*f*)
registration of, under Land Transfer Act, 1875, 420

AGREEMENT. *See* CONTRACTS.
for lease, 146 n. (*qq*), 275, n. (*ee*)

AIDS, 24, 35

AIR AND LIGHT,
right to, an incorporeal hereditament, 7, 351

ALIENATION. *See also* CONVEYANCE, MORTGAGE.
by feudal tenant without leave caused forfeiture, 22
in mortmain, *id.*, 67, 90
to an alien, 22, 101

ALIENATION—*continued.*
by particular tenants, 22
of land by sale promoted by Statute of *Quia Emptores*, 33, 40
of realty by will, given to *tenants in fee* by 32 H. VIII. c. 1, 40, 88, 319
by tenants *pur autre vie*, by 29 Car. II. c. 3, s. 12, 40
by tenant *for life*, 45, 60
by tortious or by innocent conveyances, 45, 277, 279
of estate tail, 65—74. *See* TAIL.
by tenant in fee, 85 *et seq.*, 274 *et seq.*
growth of power of, 87 *et seq.*
attempted, by infants and lunatics, 112, 113
by married woman tenant in fee, 114 *et seq.*, 128, 298, 315
condition against, 172
by joint tenant, 234
of leaseholds, 137, 286
of uses, and equitable estates, 251, 264
restrictions on, by conveyance not applying to appointments, 298

ALIENS, 22
may now acquire and dispose of land as a natural-born British subject, 101

ALLODIAL SYSTEM,
described, 18
absorbed by feudal, 24

ALLODIUM,
used in opposition to Feud, 19, 82

ANCIENT DEMESNE, 32, 33

ANIMALS, &c.,
absolute property in *domesticated*, 13
qualified in *wild* or at liberty, *id.*
WILD, include fish in a pond, game, doves, *id.*
which belong to owner of land *ratione privilegii*, *id.*
no larceny of *wild*, at Common Law, *id.*
effect of reclaiming *wild*, 13, 14
domesticated, pass to owner's executor, 14
deer, rooks, 14 n. (*r*)

ANNUAL CROPS, ANNUAL PROFITS, 10, 46, 48, 49. *See* EMBLEMENTS.

ANNUITY OUT OF LANDS,
an incorporeal hereditament, 7, 360

ANTICIPATION,
restraint on, by married women, 118, 309 n. (*h*)

APPOINTMENT,
to younger son who afterwards becomes the eldest, 294
power of revocation and new, *id.*
of married women and infants, 298, 310
powers of, to parents in favor of children, 301 *et seq.*
power of, to appoint to a *class*, *id.*
powers of, since 1874, practically exclusive at pleasure of appointor, 303, 304

APPOINTMENT—*continued.*
general and *special* power of, 305
to unborn persons, *id.*
must not violate rules against perpetuities, 303 *et seq.*
made to persons not object of power, 308
to separate use, *id.*
general power of, over land, 310, 322, 324
powers of, in connection with lapse of gift in will, 325 326

APPORTIONMENT OF RENT, &c., 46, 47, 155, 362

APPURTENANCES, 358
'appurtenant' and 'appendant' distinguished, 344

ASSETS,
freehold lands subject to a general power of appointment are, 310
any estate or interest in lands are, for payment of debts, *id.*
marshalling, 327

ASSETS BY DESCENT, 44, and n. (*t*), 266

ASSIGNMENT, 149, 264
of dower, 122
conveyance of leaseholds formerly by, 286
must be by deed, 137, 286
covenants for title in, 286
of mortgage debt, 193, 197, 466, 504
powers of tenant for life under Settled Land Act, 1882, not capable of, 530
of life interest or estate, *id.*

ASSIGNS,
how bound, 150 *et seq.*

ATTAINDER. *See also* ESCHEAT.
abolished for treason and felony, 23, 78, 112, 123, 273

ATTORNEY, POWER OF, 307, n. (*h*), 314, 315, 483 *et seq.*, 503, 561
of married women, 315, 478, 479
execution under, 309, 315, 483

ATTORNMENT,
under feudal system, 21, 213, 278
at present day, 150, 206
by mortgagor to mortgagee, 184

BANKRUPTCY,
of tenant in tail, 77, 78
of tenant for life, 110
of tenant in fee simple, 103
of married woman, 121, 539
of clergyman, *id.*
estate limited to A. for life, until, &c. 173
of donee of power, 309
of trustee, 266
of mortgagor, 182
of registered proprietor, transmission of land on, under Land Transfer Act, 411
meaning of word in Conveyancing, &c., Act, 1881, 452

BANKRUPTCY ACT, 1869, 32 & 33 Vict. c. 71. *See the* TABLE OF STATUTES.

BARGAIN AND SALE, 283, 286, 293, 353
BARE TRUSTEE 256, 313, 40, 475
BASE FEE, 64, 73, 76, 77, 84, 168
parson or vicar in some cases has, 84, 121
right of person entitled to, under The Settled Land Act, 1882, 76, 77, 532

BASTARD,
owner of land dying without will, 35, 81 *et seq.*
assignee of estate *pur autre vie*, dying intestate and unmarried, 44
sequestration of, 121

BENEFICE,
meaning of term in Feudal System, 18, 19

BOC-LAND, 25

BOROUGH-ENGLISH, 28, 62, 88

BOROUGHS, 28

'BUILDING PURPOSES,'
what they are, 452, 509

BURGAGE,
tenure in, 27, 28
how regulated by custom of *Borough-English*, 28
lands in, always devisable by custom, 29

CANAL,
shares in, are personalty by statutes, 15 n. (*y*)
tenant for life making, by way of 'improvement,' 54, 520

CERTIFICATE. *See* LAND.

CESSER OF LIFE ESTATE,
how lessee recompensed where cesser occurs, 11
of life interest, 39, 40

CESSER OF TERM OF YEARS, 161

CESTUI QUE TRUST,
has no legal ownership of trust property, 38, 39, 247
is protector of settlement as against trustee, 74
interest of, called an 'equitable estate,' 260
tenant at will, by law, 139

CESTUI QUE USE, 248 *et seq.*

CESTUI QUE VIE, 40
death of, how prevented being concealed, or presumed, 45, 214

CHARGE,
extinguishment of, doctrine of equity, 191
on realty of debts and legacies, 330, 331
implied, of debts, 332
implied, of legacies, *id.*
effect of, on trust and mortgage estates, 337
on realty, how to effect by will, 333

CHARITABLE TRUSTS, CHARITIES, 93 *et seq.* *See* MORTMAIN.

CHARTER,
or deed of feoffment, 20, 274
of Henry I., 39 n. (*b*)

CHATTELS, 4, 8, and n. (*m*)
in nature of heirlooms, 7
how property in, passes, 38
settlement of, 38
'goods and chattels,' 137

CHATTELS REAL, 9, 10, 137
include *estates at will*, for *years*, and by sufferance, 137
creation and transfer of, *id.*
devolution of, 138
not subjects of feudal fief, 137
classification and description of generally, 137—164. *And see* LEASEHOLDS, ESTATES AT WILL, ESTATES FOR YEARS, ESTATES BY SUFFERANCE.

CHATTELS VEGETABLE, 11

CHIEF RENTS, 360

CHILD-BEARING,
legal presumption as to possibility of, 63, and n. (*c*)

CHILDREN,
portions for, 161, 260
mode of providing for, otherwise than by 'strict settlement,' 80
provisions for, not mentioned in Thellusson Act, 101
posthumous, their rights, &c., 129, 215
formerly (and in gavelkind) entitled to inherit land equally, 129
power to appoint to only, 325

CHIVALRY,
tenure in, 26, 33

CHOSES IN ACTION,
or incorporeal chattels, 8
assignable under Judicature Act, 1873, 9
mode of assigning, *id.*
included in term 'property,' 15, 547
may be conveyed by A. to himself jointly with B., 256

CHOSES IN POSSESSION,
corporeal chattels, 8

CHURCH LANDS, 84, 121. *And see* MORTMAIN.
now chiefly held by tenure of Frankalmoign, 36

CLASS,
power to appoint to, 302, 325
gift by will to, 325

CLERGYMEN,
have a qualified fee simple in benefices, 121
sequestration of benefices of, for debt, *id.*

CODICIL, 318

COMMISSIONERS, LAND, 58, 236, 349, 360, 362, 528 *et seq.*

COMMON, RIGHT OF, 6, 30, 344, 345, 348—356. *See* HEREDITAMENTS.

COMMONS ACT, 1876, 39 & 40 Vict. c. 56. *See the* TABLE OF STATUTES.

'CONCORD,'
meaning of, in connection with fines, 70

CONDITION, 154 n. (*g*)
or proviso for re-entry by a lessor, 154—156
apportionment of, in lease, 155, 464
estate on, defined, 165
implied or *expressed*, *id.*, 166
precedent or *subsequent*, *id.*, 167
pure, 167
conditional limitation, *id. et seq.*
instances of estates on, 85, 167, 174
distinction between, and limitation, *id.*, 169
lease for years on a specified, 169
stranger taking benefit of, 149, 170, 206, 321
impossible, *illegal*, *repugnant*, 171, 172
in restraint of marriage, 172
not to alienate, *id.*, 173
to hold estate until bankruptcy, 173
as to taking name and arms of settlor or testator, *id.*
subsequent, and no gift over, 174
breach of, when equity will relieve for, *id.*, 156, 361
general, in restraint of marriage, void, 172

CONDITIONAL FEE. *See* BASE FEE.

CONSTRUCTION,
of POWERS before July 30, 1874, 303, 304
of devises, 340
of deeds, &c., 484—487
of implied covenants, 487

CONTRACT. *See* HUSBAND AND WIFE, LEASE, SALE.
estate for years, or a lease, 10, 143, 145, 281
meaning of, in Married Women's Property Act, 1882, 120, 546
in respect of lands to be in writing, 275 n. (*ee*)

CONVERSION,
constructive, of realty into personalty, 80

CONVEYANCE. *See also* FORMS, COVENANTS, MORTGAGE.
tortious and innocent, 45, 277, 279
by tenant for life, 45, 60
by tenant in tail, 72
of immediate freehold, 20, 85, 407
of estates in expectancy, 85, 203
'convey' used instead of 'grant'; includes assignment, &c., 86, 279, 286, 451, 461, 484
registration of, *id.*, 104, 105
by infant, voidable, 112
force of words 'unto and to the use of' a grantee, in a, 255
to a man to the use of himself, *id.*, 484

CONVEYANCE—*continued.*
by married woman, 114 *et seq.*, 128, 422
between husband and wife, 255, 256
of a leasehold, 137, 149, 275, 286, 408
of an equitable estate, 264, 265
of a *chose in action* under Conveyancing Act, 1881, 256
by FEOFFMENT, 20, 245, 274—278, and *see* FEOFFMENT.
by GRANT, 278—280, and *see* GRANT.
by LEASE OR DEMISE, 280—282, and *see* LEASE.
by RELEASE, 282, and *see* that Title.
by LEASE AND RELEASE, 283—285, and *see* that Title.
COVENANT TO STAND SEISED, 286
practically, every modern conveyance is by deed of grant, 285
besides grant which may still be used, 285 *et seq.*
at Common Law and under Statute of Uses, how distinguished by Butler, 287
on fee-farm rent, 305
general words in, 358, 455, 456
by a person to himself, 484
under Settled Land Act, 1882, 516, 519

CONVEYANCING ACTS, 1881, 1882, 44 & 45 Vict. c. 41, 45 & 46 Vict. c. 39; in Appendix, 448—505; *see* TABLE OF STATUTES and appropriate titles.

CONVICT,
property of, how dealt with during sentence, 112

COPARCENARY, 39. *See* ESTATE.
female heirs take together in, as coparceners, 130, 133
estate held in, 227
nature of ownership by, explained, 239 *et seq.*
partition of estate in, 240
advowson in, who presents to, *id.*
how, differs from tenancy in common, *id.*

COPYHOLDS,
origin and history of, 30, 31, 32. *See* MANORS.
incidents of copyhold tenure, 31
heriots, *id.*
held at will of lord, *id.*
Court Rolls, 32
ancient demesne and customary freeholds, *id.*
convertible into freeholds, 33
judgments affecting, 103
not touched by Conveyancing Act, 1881, except where they can be dealt with as freeholds, *id.*, and 461
Commissioners of, now merged in 'Land Commissioners of England,' 58
sale of, under Lord Cranworth's Act, 163 n. (*rr*)
pass by general devise of lands, 337
title where enfranchised, 453
power to lords of settled manors to grant licence to lease, 437
power of life tenant to grant to copyholders licence to lease, 514
conveyance of, under Settled Land Act, 1882, 516, 519

P P

COPYRIGHT, 8

CORPORATIONS,
grant in fee to, 83, 90 *et seq.*
included in 'person,' *id.*, 399, 452, 510
various kinds of described, 90 *et seq.*
devise to, 324
conveyance by or to, was by feoffment, 203, 276

CORRODIES or PENSIONS, 344, and n. (*c*)

COSTS, out of settled property, 528

COUNTY COURT,
jurisdiction of, in ejectment, 3
in suits for foreclosure, 180
partition, 236
under Trustee Acts, and Trustee Relief Act, 270, 273
under Settled Land Act, 1882, 528

'COURT,' means the High Court of Justice, under The Settled Estates Act, 1877, The Conveyancing Acts, 1881, 1882, and The Settled Land Act, 1882, 434, 452, 510
of Equity, and High Court, 246

COURT BARON, 30, 35

COURT OF CHANCERY OF COUNTY PALATINE OF LANCASTER, 104, 106
powers of, under Settled Estates Act, 1877, 444
under Settled Land Act, 1882, 528

COVENANTS. *See* CONVEYANCE, LEASE, LIMITATION STATUTES OF.
how differing from proviso or condition, 154 n. (*g*)
devolving on heir, or special occupant, 45 n. (*x*)
running with the land, 149 *et seq.*, 152, 305, 485, 486
restrictive, as to mode of using land, 150 n. (*k*), 270 n. (*l*)
to repair, *id.*, *ibid.*
relating to land of inheritance, how affected by Conveyancing Act, 1881, 151
of indemnity against rent and covenants, 153
running with reversion, 151 *et seq.*, 156, 176, 177, 207, 314, 463, 464
by and *to* trustees or other joint tenants on sale of land, 228, 239, 279, 280
when, and what, implied, 152, 153, 239, 279, 456 *et seq.*
by and with tenants in common, 243
'for title' in conveyance, what they are, 279 *et seq.*, 456—461
what, a purchaser is entitled to on sale of freeholds, and leaseholds, 280, 286
by lessee, 148 *et seq.*
by lessor, 282, 314
by mortgagor of leaseholds, of freeholds, implied, 153, 196
absolute, qualified, 154, 196, n. (*i*)
implied, under Land Transfer Act, 1876, 406, 410
registration of, under Land Transfer Act, 1875, 421
implied, &c., in statutory mortgage, 474
construction of, to bind heirs, 110, 151, 485, 486
of two or more jointly, effect of, 152, 239, 486

COVERTURE. *See* HUSBAND AND WIFE.

CREDITORS,
life estate conveyed for benefit of, 59, 110
of tenant in tail, 77, 78
of tenant in fee, 102 *et seq.*
by specialty and simple contract, 110, 111 n. (*s*), 366, 378
of married woman, 120, 121
of clergyman, 121

CROSS REMAINDERS, 242

CROWN,
land retained by, under feudal system, 6
jewels of the, are heirlooms, 7
ultimate title of, to soil, 35, 38, 82
grants by, not to be construed against, 41
entails granted by, for public services revert to, 72, 447
leases by tenants in tail, 76, 532
debts due to, by tenants in tail, in fee simple, 77, 78, 105, 265
trust estates subject to debts owing to, 265
could not be seised to use prior to Statute of Uses, 267
rights of, when barred, 364
registration of lands belonging to, 416
reversions belonging to, not subject to the Settled Estates Act, 1877, 447
reversion in, power of tenant in tail under Settled Land Act, 1882, 76, 77, 532

CURTESY OF ENGLAND,
tenant by the, 60, 122
extends to all wife's lands except those in gavelkind, 127
is for widower's life, *id.*
in gavelkind, *id.*
in wife's separate estate, *id.*
requisites to holding by, *id.*, 128
powers of tenant by, *id.*
origin of, not clear, *id.*
in reversionary estate, 203
land of *joint tenant not* liable for, 228
secus as to land of *tenant in common*, 243
notice of estate by, under Land Transfer Act, 1875, 413
tenant by, his rights under the Settled Land Act, 1882, 128, 533
under the Settled Estates Act, 1877, 123, 445

CURTILAGE OR COURTYARD,
when, passes by grant of house, 5

CUSTOMARY FREEHOLDS, 32, 33, 453, 461
pass under a general devise of lands, 337

CUSTOM,
how old tenures regulated by, 28
of right to alienate by infant tenant, 29
of exemption from escheat, *id.*
of devising lands before 32 H. VIII., *id.*
distinguished from prescription, 352
no right can be claimed by, to a profit *à prendre* in a shifting body, *id.*

CUSTOM OF MANOR,
controls will of lord, 31
copy of Court Roll according to, 32

CY-PRÈS,
doctrine of, 220

DEATH, CIVIL,
may determine life estate before tenant's natural death, 39
no, now for treason or felony, 40
still accrues on outlawry, *id.*

DE BONIS CONDITIONALIBUS,
statute, 65, 85. *See* the TABLE OF STATUTES.

DEBT. *See* ASSETS, ASSETS BY DESCENT, CROWN.
included in term 'property,' 15
payment of, by sale or mortgage of settled estate, 59
owing by tenant in tail, 77, 78
of tenant in fee, 102 *et seq.*
of record, 104
search for registration of, 106, 499, 500
after death of debtor tenant in fee, 110
specialty and by simple contract, *id.*, 111 n. (*s*), 366, 378
of *cestui que use*, 250, 252
of *cestui que trust*, 265, 266
judgment, of donee of a power, 310
of married woman in connection with POWERS, *id.*
any estate or interest in lands, will be assets for payment of, *id.*
residuary devise ranks *pari passu* with specific devise, for purpose of paying, *id.*
where residuary personal estate insufficient to pay, 327
realty charged with payment of, 330, 331
order of liability to pay as between different parts of an estate, 330 n. (*gg*)
direction to executor to pay; executor renounces, administrator cannot sell estate, 331
implied charge of, 332
no liability of land for, at Common Law, 333
History of liability of land to pay, *id.*, 334
liability of separate estate of married woman, 120, 121
liability of husband and wife respectively for her ante-nuptial, 543, 544

DEED. *See also* TITLE DEEDS and FORMS.
or charter of feoffment, 20, 274
effect of grant 'to A. B.' by, 41
of grant always an innocent conveyance, 45, 279
construed more strictly than will, 63
barring entail, 72 *et seq.*, 79
of grant the ordinary mode of conveying land, 86, 279
lease by, and conveyances of leaseholds by, 137, 141, 149 n. (*g*), 170, 281, 286
rights of entry disposed of by, 171, 206
contingent interest disposed of by, 219
secret, disposing of USE, 251
feoffment requires a, 276
not required for feoffment of property under custom of gavelkind, *id.*
livery in, described, *id.*

DEED—*continued.*
grant required to be by, 278 *et seq.*
execution of powers by, 312
executed under power of attorney, 315
execution of purchase, 461
construction of, and other instruments, 484—487
supplemental or annexed, construction of, 484
receipt in, sufficient, 485
receipt in, or indorsed, evidence for subsequent purchaser, *id.*
various FORMS of, 493—497
acknowledgment of, by married women, 114, 501 *et seq.*, 558

'DEFEASANCE,' 294
DESCENDANTS, 129 *et seq.*

DESCENDING LINE,
heir in tail found only in, 61. *See* HEIR.
when issue in, exhausted, 133

DESCENT (OF LANDS, &c.),
history of, of freeholds, 129 *et seq.*
rules of, whence obtained, 129
rules or canons of, set forth, *id. et seq.*
posthumous child taking by, takes from birth, 129, 215
of settled land, 131
how traced when no heirs of purchaser, 132
to issue of purchaser, *id.*
preference of males to females, 133
representation by issue, *id.*
'*per stirpes*,' not '*per capita*,' *id.*
on failure of descendants, *id.*
preference to paternal line, 134
to issue of ancestor *in infinitum*, 135
to half-blood, *id.*
of USES, 251

DEVISE. *See also* WILL.
vested or contingent, 219
what may be included in general, 322
to a corporation, *id.*
lapse of, *id. et seq.*
residuary, is specific, 326, 327

DEVISE (GENERAL),
what it includes, 337

DEVISE (INDEFINITE),
effect of, 341

DEVISEE,
when entitled to emblements, 11
not *hæres factus*, but takes by conveyance, 11 n. (*y*)
right of, to fixtures, 12
meaning of term *deviser*, 88 n. (*h*)
will take lapsed devises as against heir, 326
execution of trust by, 338

DISCLAIMER, 22
of powers by trustees, 301, 501

DISCOVERY, INTERROGATORIES, and INSPECTION OF DOCUMENTS, under Land Transfer Act, 1875, 425

DISTRESS,
no, for fixtures, 12
defined, 206
in connection with rent-charge, 359
a remedy under Conveyancing Act, 1881, *id.*
Statute of Limitations as to, 365, 375

DOMESDAY, 33

DOMICILE,
law of owner's, governs his personal property, 16

DOWER,
writ of right of, 3
unde nihil habet, 3
ordinary interest of wife in husband's lands, 28, 60
estate in, how regarded, 39, 122 *et seq.*
changes in doctrine of, *id.* n. (*b*)
in gavelkind, 122
assignment of, 122
when forfeitable, *id.*, 123
how defeated under Dower Act, 124
how otherwise defeated, 125 *et seq.*
effect of Dower Act, 126
equitable bar by contract, 126
under old law, *id.*
difficulty of defeating right of, *id.*
tenant in, may now lease, 127, 445
in reversionary estate, 203
lands of *joint tenant* not liable for, while jointure lasts, 283
sans as to lands of tenant in common, 243
barring, by means of powers, 292
notice of estates in, under Land Transfer Act, 1875, 413

DUTY (SUCCESSION), 136

EASEMENT,
lease of, by tenant for life under Settled Land Act, 1882, 58
defined and illustrated, 351
dominant and servient tenement, *id.*, 355
created by express grant must be by deed, 353
prescription, 353 *et seq.*
'continuous' and 'apparent,' 356, 357
'of necessity,' 350, 357
'discontinuous,' *id.*
quasi, *id.*
extinguishment of, 358
grant of, by way of use, 353, 437

EDUCATION
of infants, application of income for, 13, 681.

EJECTMENT. *See* COUNTY COURT.
a personal action until about A.D. 1600, 3
for non-payment of rent, 157, 158, n. (*e*)
action of, under Judicature Act, 1873, 3, 247 n. (*g*)
Statutes of Limitation, as to action of, 365, 375, 376

ELEGIT,
writ of, 77, 103
estate by, 200
'use' could not be extended by writ of, 250

EMBLEMENTS, or GROWING CROPS,
devolve on personal representatives as against heir, 10
secus as to devisee, except where expressly deprived, 10, 11
where tenant has limited interest, 11
growth of, delayed by weather, 11
compensation in lieu of, where tenant for life dies, 11, 46
right of tenant *pur. autre vie* to, 46, 48, 49
right to, on termination of lease, 148

ENFRANCHISEMENT,
of villeins, of copyholds, 33
by tenant for life, 510, 511, 515

ENROLMENTS,
STATUTE OF, referred to, 284. *See the* TABLE OF STATUTES.
of disentailing assurances, 372
of deeds of charitable gift under MORTMAIN and other ACTS, 94 *et seq.*

ENTAIL. *See* TAIL.

ENTIRETY,
husband and wife seised of, 233

ENTRY, RIGHT OF, 171
for non-payment of rent, 170
may be disposed of by deed, 171, 206, 219
may be subject of devise, 321
actual, not now necessary, 158, 169
time when first accrues, 367, 375

EQUITABLE ESTATE, 245
described, 247, 248. *See* USES AND TRUSTS; HUSBAND AND WIFE.

EQUITABLE MORTGAGE, 711.
EQUITY. *See* CHARGE, ESTATE, MORTGAGE, REMAINDER, TRUSTEE.
true legal notion of, 248
following and not following the law, 251, 260

EQUITY OF REDEMPTION, 178. *See* MORTGAGE.

ESCHEAT. *See also* ATTAINDER.
origin of term, 22 n. (*s*)
and forfeiture now abolished for treason and felony, 23
exemption from, by custom, 29
when land may, to Crown at present day, 35, 82
as affecting trust estate, 249, 273

ESCUAGE OR SCUTAGE, 21, 33

ESTATE,
technical meaning of term, 38
'interest,' meaning of term, *id.*, 219, 232, 262
no, in personalty, 38
legal, of trustees in personalty, *id.*, 39
Quantity and *Quality* of, 39
in *severalty*, held *jointly*, in *coparcenary*, and *in common*, *id.*, 227 *et seq.*
FOR LIFE; *see* LIFE ESTATE.
of freehold is for life, in tail, or in fee, 39
settled, dealings with, 54 *et seq.*, 58, 59, 76, 238, 433—448, 505—537, 548—557
TAIL—FEE SIMPLE; *see* those Titles.
in expectancy, 85, 86, 201 *et seq.*
descent of, in freeholds, 130 *et seq.*
of married woman, 114
by *curtesy*, 127
less than freehold, 137
at will, 139 *et seq.*
for *years*, 143
by *sufferance*, 137 *et seq.*
on *condition*, 165—172
in *possession*, in *reversion*, 201 *et seq.*, 225
in *remainder*, 207 *et seq.*, 225
by *executory devise*, 221—226
in an office, 165, n. (*c*)
ownership of, four kinds of, 227
in '*severalty*,' described, *id.*
in JOINT TENANCY, 228
right of survivorship in, *id.*, 234
no dower or curtesy in, *id.*
gift to several (who cannot intermarry) and the heirs of their bodies, *id.*
unities of, 229—233
husband and wife seised of the entirety, and do not hold by, 234
release by one joint tenant to another, *id.*
severance of, 234, 235, 238
partition of, 235 *et seq.*
trustees hold in, 238
how affected by Settled Land Act, 1882, *id.*, 505—537
severance by accession of interest, 238
trustees hold by, *id.*
covenants by and with persons holding by, *id.*
favored by law but not in Equity, 241
in COPARCENARY, 239, and *see* that Title.
presentation to Advowson by persons holding in, 241
presentation by joint tenants and tenants in common, 241
by TENANCY IN COMMON, 241
described, *id.*
at Common Law, *id.*
how created, *id.*, 242
favored in Equity, 242
cross-remainders, *id.*, 243
how created in a settlement, *id.*
partition, *dower*, *curtesy* in, 243
covenants by and with those holding estate, 243

ESTATE—*continued.*
waste committed by tenants in common and joint tenants, 243, 248
equitable, another term for beneficial interest, *id.* *See* EQUITABLE ESTATE.
when legal estate prevails, 247, 269
at Common Law could only be limited in possession or in remainder, 251, 262
ESTATE TAIL, 61 *et seq.* *See* TAIL.

ESTOPPEL,
doctrine of, 145

ESTOVERS or BOTES,
meaning of term, 47, 148
right of tenant for life to, *id.*
common of, 349

EXCHANGE,
power of tenant for life or in tail to effect, of settled lands, 54 *et seq.*, 76, 294, 510, 515. *See* SALE.

EXECUTION, 77, 265, 310
under power of attorney, 315, 483
of trust by devisee, 338

EXECUTOR,
not required in will of realty, 330
power of, to raise money for payment of debts, *id.*, 331, 332
direction to, to pay debts and executor renounces probate, 331
right of, to retain debt due to himself, 334, n. (*d*)
real estate devised to, how construed, 339
trustee's and mortgagee's estate going to, 199, 337
power of, under Conveyancing Act, 1881, 333, 478
married woman as executrix or trustee, 545

EXECUTORY DEVISE,
described, 221, 222
alienation of, 222
how, differs from a contingent remainder, *id.*, 225
period within which estate arises, *id.*
where, to arise after indefinite failure of issue, 223
limitation by way of, after estate tail, *id.*
limitation void for remoteness, example of, 224
effect of failure of prior gift on, *id.*
illustration of estate by, 226

EXECUTORY INTEREST,
contingent remainders now take effect as, 262, 263

EXECUTORY LIMITATIONS,
restrictions on, by Conveyancing Act, 1882, 224, 264, 504

'*EX PROVISIONE VIRI*,' 72

'FARM,' 9
meaning of word, 281, 282

FEALTY, 20
oath of, obsolete, 5
one incident of a reversion, 205, 211

FEE-FARM RENT,
lease on, 59
conveyance on, 305, 438
described, &c., 360 *et seq.*

FEES, ORDER OF COURT AS TO,
under Fines and Recoveries Act, 567, 568
under Conveyancing and Law of Property Act, 1881, 561

FEE SIMPLE,
tenure of estate in, cannot be created, 34. *See* QUIA EMPTORES
tenant in, dying intestate without heir, 35
present incidents of tenure by, *id.*
distinguished from estates for life and in tail, 81
at first inalienable, but now in perpetuity, *id.*
'purchase' defined, *id.*
bastard tenant in, dying intestate, *id.*
when escheats to Crown, 35, 82
derivation, &c., of term, 82
its nature and mode of creation, *id.*
words of inheritance were required to create, *id.*, 231, 242, 278
when created by will and by deed, 83
is granted to corporate body and their 'successors,' *id.*
classification of estates in, 84
absolute, qualified or *base fee, conditional fee, id.*, 165
alienation of, 85, 274 *et seq.*
held by CORPORATION; MORTMAIN; CHARITIES; SUPERSTITIOUS USES; rule against PERPETUITIES (*See* those Titles).
can now be acquired, &c., by alien, 101, 102
debts of tenant in, 102 *et seq.*
bankruptcy of tenant in, 109
voluntary settlement by, 108, 109
debts after death of tenant in, 110
infant tenant in, 113
lunatic tenant in, *id.*, 114
powers of married women tenants in, *id. et seq.*
qualified, held by clergymen in benefices, 121
descent of estate in, *id.*, 122 *et seq.*, 129 *et seq.*
tenant in, dying intestate, 132
rules of descent of, different from those as to estate tail, 133 *et seq.*
feoffment in, on certain condition, estate is absolute in feoffee, 173
mortgage of, 174 *et seq.*
estate in, will, *prima facie*, pass by indefinite devise, 341
enlargement of long term of years into, 163, 487, 488
tenant in, with gift over on failure of issue, his rights under The Settled Land Act, 1882, 532

FEE TAIL, 61 *et seq.* *See* TAIL.

FELONY,
forfeiture and escheat of lands, &c., for, now abolished, 28, 78, 112

FEOFFEE,
holds lands only from next lord paramount, 35, 87

FEOFFMENT. *See* CORPORATION, LIVERY.
defined and described, 20, 274, 276, 287
actual and symbolical possession by, *id.*, 245
accompanied by oath of fealty and homage, *id.*
under Statute *Quia Emptores*, 33, 40
tortious operation of, 45, 277
no, made after Oct. 1, 1845, has any tortious operation, 46, 86
to A. to the use of B. makes B. absolute owner, 254
applied to conveyance of freeholds in possession, 274
of particular estate passed remainder, 213
operative words of, 275
writing not essential for, until Statute of Frauds, *id.*
made after Oct. 1, 1845, to be by deed, 276
under custom of gavelkind by infant, need not be by *deed*, *id.*
required consideration after Statute of Uses, *id.*
limitation of the estate given by, 278
attornment of tenant where, of a reversion after lease for years, *id.*
may still be used, 276, 278, 285

FEOFFORS,
intermediate, abolished by Statute of *Quia Emptores*, 33

'FERMORS,'
meaning of, 50, 51

FEUDAL SYSTEM,
nature of, 6, 34
history of, in England, 24, 25, 33—35
SERVICES under, were Free, Base, Certain, Uncertain, 25, 26
Knights, Freemen, Villeins, 26, 29, 30
division of title into tenure, *id.*
'Frank Tenement,' 'Villenage,' *id.*
Knight Service or in Chivalry, Free Socage, *id.*, 27
Grand and Petit Serjeanty, Burgage tenure, Gavelkind, 27
abolished, 33—35
effect of alienation by tenant without licence, 22. *See* ALIENATION.
'disclaimers' of tenant, *id.*
allodial system absorbed by, 24
lands under, styled 'tenements,' *id.*
King Lord Paramount under, *id.*
whether, prevailed in England before Conquest, *id.*
fully introduced here after then, *id.*
described, 17—37, 249
subinfeudation, 19
abolished, 33, 34
INCIDENTS of, *Relief*, *Fine*, *Scutage*, *Forfeiture*, *Attornment*, 21, 35
Escheat, 22, 23, 35
Primer Seisin, 23
Aids, *Wardship*, *Marriage*, 24, 35
attempt to alienate lands under, 40, 45, 88, 319
descent of lands before and after, 129
'seisin' under, described, 138, 139, 212, 276, 289
estate under, could not commence *in futuro*, *id.*
distinction between freehold and chattel interest in, 137

FEUD, FEE OR FIEF, 8
described, 18, 19, 82
term used in opposition to *Allodium*, 19
how created—*Dedi et Concessi*, Investiture, Livery of Seisin, 20, 245
effect of increase in number of Feuds, &c., 40
grant of, whether originally recoverable, *id.* n. (*h*)
chattel interest in land not subject of, 137

FIEF, FEUD OR FEE. *See* FEUD, FEE OR FIEF.

FINE,
on alienation, 21
meaning of term, 69 *et seq.*, 287
entry necessary to avoid, 169
alienation by married woman formerly by, 115, 128

FISHERY OR PISCARY,
right of, passes by gift of water, 5
right of, in a particular stream, an incorporeal hereditament, 7, 348

FIXTURES,
what they are, 11, 12
public policy in regard to, 12
right to, by tenants for terms of years, *id.*
special contract as to, *id.*
when erected by owner, on whom they devolve, *id.*
right of tenant for life to, *id.*
rights as to ORNAMENTAL and TRADE, *id.*
landlord cannot distrain, *id.*
railways are, *id.*
present signification of term, 13
agricultural, erected with or without consent of landlord, 13

FOLK-LAND, 25

FOREST, included in 'land,' 4

FORECLOSURE, 181, 182, 185
action for, is an action for recovery of land within 7 Wm. IV. & 1 Vict. c. 28, 368 *et seq.*

FORFEITURE,
what acts caused, under Feudal system, 22, 23, 45
and escheat for treason and felony, how abolished, 23, 78
still consequent upon outlawry, *id.*
of dower by widow, 39, and n. (*b*), 122
in case of crime and, defendant cannot be arrested on a *capias*, 40
committing waste formerly tantamount to a, 51
restrictions on, and relief against, of leases, and grants in fee farm, 157, 361, 464, 465
no, by tenant for life exercising powers under Settled Land Act, 59, 531

FORMS, 86
STATUTORY MORTGAGE, 493
,, TRANSFER, mortgagor not joining, 494
,, ,, a covenantor joining, *id.*
combining the above two deeds, *id.*
of Statutory Re-conveyance of Mortgage, 495
of Mortgage Deed, *id.*
of Further Charge, 496
of Conveyance on Sale, *id.*
of Marriage Settlement, *id.*
various, of Summons and Affidavits under Settled Land Act, 1882, 551—557
See notes *passim* referring to PRECEDENTS.

FOSSILS, included in 'Land,' 5

FRANCHISE,
an incorporeal hereditament, defined, 344

FRANKALMOIGN,
not abolished by 12 Car. II. c. 24; 35
a tenure of a spiritual character, *id.*
described, *id.* 36
Church lands now mainly held by tenure of, 36

FRANK MARRIAGE,
tenure by, described, 36, 37
now obsolete, 36
doctrine of 'hotchpot' derived from, 37

FRANK TENEMENT, 26

FRAUD,
by seller or mortgagor, 188
when imputed against purchaser, 269
its effect on the operation of Statutes of Limitation, 380—393
in connection with registration under Land Transfer Act, 1875, 424

FRAUDS (STATUTE OF), 29 CAR. II. c. 3, 146 n. (*qq*), 275. *See* TABLE OF STATUTES.

FREEHOLD,
modern term for free socage tenure, 26, 27
estates of, 39
life estate is, 39
term defined, 40 n. (*h*)
estate tail is, 63. *See* DESCENT, FEE SIMPLE, TAIL, LIFE ESTATE, LAND, &c.
mortgages of, 174 *et seq.* *See* MORTGAGES.
conveyances of, 274 *et seq.* *See* CONVEYANCES.

FREE SOCAGE,
incidents of tenure by, and explanation of term, 27
three varieties of tenure by, *Petit Serjeanty, Burgage, Gavelkind, id.*
estates held in, partible among all sons of tenant, 28
described, 26
present tenure of bulk of English land since 12 Car. II. c. 34, *id.*
equivalent to modern term freehold, *id.*, 33

FURNITURE,
articles of, are not real heirlooms, 7
may be sold by tenant for life under Settled Land Act, 1882, 59, 525
how may be strictly settled as heirlooms, 79

FUTURE ESTATES OF FREEHOLDS,
means of creating, 211 *et seq.*

GARDEN, when, passes by grant of house, 5

GAVELKIND,
origin of word, tenure by, described, 27, 29
effect of custom of, on gifts 'to A. and the heirs of his body,' 62
dowress takes moiety when land is, 123
curtesy in, land, 127
feoffment under custom of, by infant, need not be by deed, 276

GENERAL WORDS now implied, 358

GOODS AND CHATTELS, 4, 8, 137
origin of term, 8
property now included in term, 8
incorporeal chattels, *choses in action*—corporeal chattels, *choses in possession*, 8

'GRAND COUSTUMIER,'
quoted from, 8

GRAND SERJEANTY,
tenure by, described, 27

GRANT,
of land originally for life only, 41
to be construed against grantor, *id.*, 42
deed of, always an innocent conveyance, 45, 279
word, now not necessary in conveyance, 86, 279, 484
means 'a gift, &c., unaccompanied with livery of seisin,' 278
used to convey incorporeal hereditaments, *id.*
a remainder must arise by, *id.*
always requires a deed, *id.*
attornment of tenant where grant of estate in expectancy, *id.*, 213
now the ordinary mode of conveyance, 279
implied warranty of donor's title, *id.*
operation of word in conveyances under Lands Clauses Act, 1845, *id.*
title to incorporeal hereditaments depends on, or on prescription, 351
implied in title by prescription—fiction of lost grant, 353
implied, of continuous and apparent easements, 356
implied, of easements of necessity, 357
right to prospect acquired by, 356

GROWING CROPS, 10. *See* EMBLEMENTS.

HALF-BLOOD,
descent of lands to persons of, 135

HEIR,
not entitled to emblements, 10
when entitled to fixtures, 12
general, to estate *in fee* found in ascending or descending line, 61, 81 *et seq.*
no general, to estate tail, *id.*
in tail found only in descending line, *id.*, 133
particular, id. ; collateral, id. ; of one sex, id.
to fee simple, how found, 81
apparent and *presumptive*, 129
devise to, 131, 215 n. (*u*)
takes as devisee under Inheritance Act, 131
failure of heirs, *id.*
how traced, 132
lineal ancestor may be, to his issue, 133 *et seq.*
preference given to, of paternal line, 134
collateral, *id.*
resorting to female stock to find, *id.*
of half-blood, 135
takes on a lapsed devise, if there be no residuary devisee, 326
debts binding on, 110, 111 n. (*s*)
covenants to bind, *id.* 151, 485
covenants to extend to, 151, 486

HEIRLOOMS,
nature of actual, 7
how and to whom they pass, *id.*
are hereditaments, *id.*
chattels *in the nature of*, distinguished, as pictures, plate, furniture, &c., *id.*
chests, &c., containing title-deeds are, *id.*
under Settled Land Act, 1882, 59, 525
furniture strictly settled as, 79
plate ,, ,, *id.*

HEREDITAMENTS,
meaning of term, 6, 7, 343
includes money directed to be laid out in lands and leaseholds, 6, 7
titles of nobility are, *id.*
CORPOREAL, are such as may be seen and handled, *id.*
INCORPOREAL, exist only in contemplation, as an annuity out of land, a right of way or common, an advowson, right of fishing in a particular stream, &c., *id.*
heirlooms are, *id.*
chests, &c., containing title-deeds, *id.*
benefits of conditions annexed to an estate, *id.*
limited in trust for succession, 54
of either kind may now be conveyed without word 'grant,' 86, 279, 484
included in 'land,' 131
Incorporeal, conveyed by deed, 278
PURELY INCORPOREAL, considered in detail, 343—362
defined and explained, 344
terms '*appendant*,' '*appurtenant*,' and 'in gross,' *id.*
tithes and advowsons, 345—347

HEREDITAMENTS—*continued.*
rights of COMMON, 348, 352
Pasture, Piscary, Estovers, Turbary, id.
rights of Common, how affected by Inclosure, *id.*, 349
rights of *Way, Water, Light, Air*, 350, 351
easements distinguished from 'profits *à prendre*,' *id.*
title to, what dependent on, *id.*
right of common for cattle levant and couchant, *id.*
easement by express grant must be by deed, 353
title by prescription, *id. et seq.*
right to a prospect, 356
'continuous and apparent easements,' *quasi*-easements, *id.* 357
'discontinuous' easements, 357
extinguishment, 358
rents, 359, 360
annuities, 360
fee-farm rents, *id.*, 361
right of re-entry, 361
registration of special, under Land Transfer Act, 1875, 420

HERIOT. *See* LIMITATION.
origin of, 31
included in 'rent,' 364

HIGH COURT OF JUSTICE, 246
powers of under Settled Estates Act, 1877, the Conveyancing Acts, 1881, 1882, and the Settled Land Act, 1882. (*See* those Acts in the Appendix, referred to as "The Court," 435, 452, 510.)

HOMAGE,
meaning of term, 20 n. (*m*)
abolished with Knight's Service, 35

'HOTCHPOT,' origin and meaning of, 37

HOUSE,
or MESSUAGE, included in 'Land,' 4
gift of, what it does and does not include, 5
pulling down, voluntary waste, 47
house-bote, 47, 148
repairs of, by yearly tenant, by tenant for years, 143, 148
'general words' in conveyance of, implied under Conveyancing Act, 358, 455

HUSBAND AND WIFE, and *see* MARRIED WOMAN.
usual interest of wife in husband's lands, 28
wife's interest where land held by custom of Borough-English, *id.*
married woman tenant for life, 59, 119, 120
husband's curtesy, 60
wife's jointure, 60, 75, 125
provision for wife in family settlement, 75, 260
married woman tenant in fee, 114
how affected by Conveyancing Act, 1882, *id.*, 115
legal and equitable estate of, 115
Married Women's Property Act, 1882, 116 *et seq.*, 538—547, and *see* that TITLE.

HUSBAND AND WIFE—*continued.*
restraint on anticipation, 118 *et seq.*
married woman barring entail, *id.*
married women's liability to engagements, 120, 121
legacy to married woman on condition of giving up estate with clause against anticipation, 119
CURTESY, DOWER, JOINTURE. *See* those Titles.
divorce of wife, its effect on dower, 123
conveyances between, effected by means of the Statute of Uses, 255
under Conveyancing Act, 1881, 256
exercise of power by one in favour of the other, 298
execution of general POWER by will, by married woman, 310
witnesses to execution of wills, 321
married woman's will before 1882 and since, 115, 322—324
effect of marriage of registered female proprietor of land, 411
married woman's consent, &c., under Land Transfer Act, 1875, 422
married woman applying, &c., under Settled Estates Act, 1877, 446
her examination, residing within or without jurisdiction of Court, 447
effect of either insuring life for benefit of either, and children, 542
husband liable for debts, contracts, and torts of wife before marriage, 43

IDIOT. *See* LUNATIC.

IMPROVEMENTS,
by tenant for life, described, 54, 57, 58, 520—523
incumbrances caused by, take priority of all others, 55

INCLOSURE OF COMMONS, 348, 349.

INCOME, *see* Accumulation.
gift of, passing the fee, 340, n. (*e*)

INCUMBRANCES,
on estate caused by 'improvements' take priority, 54, 55
caution as to searching for above, *id.*, 106
covenant by trustees as to absence of, 238
in connection with the Land Transfer Act, 1875, 400 *et seq.*
of tenants for life, how regarded under Settled Estates Act, 1877, 447
what term includes, 452
discharge of, on sale, 177, 197, 455
covenants against, 280, 458, 460
assignment of, 197, 466, 504
transfer of, on life estate, 511
mesne, or intermediate, notice of, 189, 193

INFANT,
customary alienation by, at age of fifteen, 29 and n. (*p*) 87
tenant for life, 59, 113, 533
conveyance of land by, 112
will of, *id.*, 321
possessed of lands in trust, &c., 113
feoffment by, under custom of gavelkind, need not be by deed, 276
may make settlement on marriage, 112, 298
cannot generally exercise power over realty, except where *collateral*, 298, 299
provisions as to, under Land Transfer Act, 1875, 422
leasing, sale, &c., of infant's fee simple, 113, 479—481, 533

INHERITANCE

INSURANCE,
mortgagee's power to effect, 185, 463, 470
breach of covenant by lessee to insure, 156, 464
important effect of, by husband or wife for benefit of either or children, 542

INTERESSE TERMINI, 144.

'INTEREST,'
meaning of term in property law, 38
for life, 40. *See* LIFE ESTATE.
executory, 262, 263

INTESTACY,
of tenant in fee without heir, 35, 81
of assignee of estate *pur autre vie* under various circumstances, 44
of tenant *in fee*, or in *tail*, 132

INVESTITURE,
in feudal system, ceremony of, 20, 245
no, in creation of *chattel interest* in land, 137

IRELAND,
sale or purchase of real or leasehold land in, 394
The Land Titles and Transfer Act, does not apply to, 399
The Settled Estates Act, 1877, applies to, 435, 445
The Conveyancing and Law of Property Act, 1881, applies to (sect. 72), p. 491
The Conveyancing Act, 1882, applies to, 499, 501, 502
The Settled Land Act, 1882, applies to (sect. 65), pp. 536, 537

ISSUE,
words in a will, importing failure of, 223, 340

JOINT TENANT, 229. *See* ESTATE.

JOINTURE, wife's, 60, 75, 125

JUDGMENT, 103 *et seq.*
no, will affect land unless actually delivered in execution, 77, 265, 310
searches for judgments, 106, 499

KING. *See* PARAMOUNT.

KNIGHT SERVICE,
tenure by, 26
originally the predominant tenure, 27
proper and improper, *id.*
grand serjeanty described, *id.*, 28
tenure by, no longer exists, 33
effect of abolition, 35, 89, 320

LACHES,
effect of, on the operation of Statutes of Limitation, 384

LAND,
what meant by term, 4—6, 451
includes houses, trees, water, ores, mines, &c., 4, 5
gift of water only, does not pass, 5
how general meaning of word controlled, 5, 6
commonly occupied with house, does not pass by grant of house, 5
immediately annexed to and enjoyed with it, passes by grant of house, *id.*
meaning of, in Conveyancing Act, 1881, 8, 451
ancient mode of transfer of, 20. *See* CONVEYANCE.
not generally devisable before 32 H. VIII., 29, 319
when devisable by custom, 29
settled, dealings with, 54 *et seq.*, 58, 76, 508
meaning of word in Inheritance Act, 131, 132
'covenants running with,' 149—151
no judgment affects, unless delivered in execution, 77, 103, 265
when affected by Crown debts, or *lis pendens*, 105, 265, n. (*d*)
sale of, separately from timber or minerals, 295
meaning of in Statutes of Limitation, 368
action to recover must be brought within twelve years, 376
entry on and register of title, 400 *et seq.*
mortgage of, registered, 406, 407
transfer of freehold, under Land Transfer Act, 1875, 407 *et seq.*
caution against registration of, 415
'certificate,' under Land Transfer Act, 1875, *lost*, *renewed*, &c., 419, 420
effect of deposit of, certificate, 420
settled, 508
what included in under Settled Land Act, 1882, 286, 509
how to determine whether, is or is not settled, *id.*
proceedings for protection or recovery of, 59, 525
general words in conveyances of, implied under Conveyancing Act, 359, 455

LAND COMMISSIONERS, 58, 236, 349, 360, 362, 528 *et seq.*

LANDLORD. *See* CROWN.
death of, or cesser of estate of, its effect as regards tenant's emblements, 11
cannot distrain fixtures, 12
right of, to agricultural fixtures, 13
by agreement with tenant may exclude Agricultural Holdings Act, 143
relation between landlord and tenant or assignee of lease, 149, 150, n. (*k*).

LAND TRANSFER ACT, 1875, 38 & 39 Vict. c. 87, set out in Appendix, 395—432

LAND TAX, ~~of~~ redeemable
how, may be purchased or redeemed after sale ordered by Court, 442

LAPSE of gift in will, 324, 325. *See* WILL.

LAY TENURES, all except Frankalmoign, 35, 36

LEASE AND RELEASE,
conveyance by, 45
release never a tortious conveyance, *id.*
described, 283—285
bargain and sale, *id.*, 286, 298, 353

LEASE. *See* next Title, also CONDITION, CONTRACT, COVENANTS, &c.
original character and definition of, 9, 143, 281
charge on land created by, for long period, 10, 160
power of tenant for life to grant, 54, 58, 445, 446, 511, 512, 513 *et seq.*
mining, *id.*, 512 *et seq.*; BUILDING, *id.*
power of tenant in tail to grant, 76, 532
power of tenant in dower, or by curtesy, to grant, 127, 128, 445, 533
at will, &c., 139 *et seq.*
not in writing, its effect, 141, 275, n. (*ee*)
when required to be in writing by Statute of Frauds must be by deed, *id.*, 141, 281
from year to year can be by parol, *id.*
proviso, condition, &c., in, 148 *et seq.*, 150 n. (*k*), 282
for years on certain conditions, 169
on, for life, livery of seisin was necessary, 281
entry necessary to complete, before Statute of Uses, *interesse termini*, 144, 281
operative words in, *id.*
implied covenants for title, 152, 153, 458, 459
covenants by lessor, 282
defects in, made under powers of leasing, 314
lessor's covenants in, under powers, *id.*
notice of, under Land Transfer Act, 1875, 413
loss of copy of registered, how dealt with, 419
under Settled Estates Act, 1877, 54, 55, 76, 77, 127, 128, 435—438
power of Court as to, under Settled Estates, 1877, 443
under Conveyancing and Law of Property Act, 1881, 151 *et seq.*, 171, 177, 206, 314, 463, 464
under Settled Land Act, 58, 76, 128, 129, 511, *et seq.*
restrictions on relief against FORFEITURE of, 157, 361, 464, 465
powers of mortgagor or mortgagee in possession to grant, 177, 466—468
on contract to grant, title to reversion cannot be required, 282, 287, 392, 464
lessee has constructive notice of lessor's title, 282, n. (*u*)
contract for, not part of title to, 282, n. (*u*), *Addm.*, 500
surrender of, and new grant of, by life-tenant, 58, 514
licence to make, granted by life tenant to copyholders, *id.*
grant by lords of settled manors of licence to lease, 437
application of money paid for, under Settled Land Act, 1882, 58, 524
lessee of life estate, how protected, 57, 531

LEASEHOLDS, 33, 137
in strict settlement, 79, 80
estate at will, 139 *et seq.*, 142, n. (*c*)
yearly tenancy, 140, 141
form in yearly letting, 142
yearly, not determined by death or assignment, *id.*
notice under Agricultural Holdings Act, 143
or ESTATE FOR YEARS, defined, *id.*, 145, 281
no livery of seisin in, *id.*
requirements of Statute of Frauds and Act to Amend Law of Real Property, *id.*
limitation of estate for years, *id.*
'estoppel,' 145, and n. (*o*)
'term,' commencement, *id.*, 145, 146, n. (*qq*)

LEASEHOLDS—*continued.*
'surrender,' 146
'merger,' *id.*, 147, 203
'estovers' and waste, 143, 148
rents and covenants, *id.*, 149, 205, 282
'covenants running with the land,' *id.*, 149 *et seq.*
reversion of, 149, 202 *et seq.*
assignee of reversion of, *id.*, 150, 205, 206
mortgage of, 153
provision for re-entry, 154
severance of reversion, 155
licence for breach and waiver of benefit of covenants, 154, 156, 159, n. (*h*), 174, 361, 465
condition of re-entry, *id.*, 206; *see* ENTRY, RIGHT OF.
breach of covenants to insure, *id.*, 157, 464
non-payment of rent, 157, 158, 206
increase of rent, 158
'usual quarter day,' 159
liability of executor and administrator to perform covenants in lease, *id.*
underlease, 160
sale of lease, performance of covenants, *id.*
'proviso for cesser' and assignment of terms, 161
'satisfied' term, 162, 163
how residue of long, enlarged into fee simple, 163
effect of sale by mortgagee, *id.* n. (*rr*)
by sufferance, 164
remedy for holding over, *id.*
rule under Locke-King's Act, applies to, 187
how conveyed, 137, 286
covenants in an assignment of, 152, 286, 287
assignee of, not entitled to call for title to reversion, 282, 287, 392, 453
pass under a general devise, 138, 337
registration of, 401—406
transfer of under Transfer Act, 1875, 408 *et seq.*

LEGACY,
deemed satisfied at the end of twelve years, in absence of interest or acknowledgment, 378
so, if charged upon land or rent by express trust, 379
charge of, on land, 330, 332

LEGAL ESTATE,
'getting in the legal estate,' 247, 269

LESSOR AND LESSEE. *See* LEASE.

LEX SITÛS, 15, 16

LIFE ESTATE,
tenant of, how lessee compensated for emblements, 11
rights of tenant of, to fixtures, 12
or one for LIVES, 39
is a freehold, *id.*, 40, and n. (*h*)

LIFE ESTATE—*continued.*
'held,' and 'capable of being held,' *id.*
dower regarded as, *id.*
how determinable in tenant's lifetime, *id.*
interest of tenant of, why formerly limited to his natural life, 40
estate *pur autre vie*, *id.*
cestui que vie, *id.*
contrasted with a grant for a term of years, 41
grant of land 'to A. B.' by *deed* gives him a, *id.*
'to A. B. and his heirs,' confers an absolute estate in land, *id.*
gift by *will* 'to A. B.' passes fee, in absence of context to contrary, *id.*, 42
estate for a man's own life of higher nature than *pur autre vie*, *id.*
tenant of, assigning to B. for B.'s life, 44
power of tenant of, to alienate, 45, 321
executors of tenant of, take emblements, 46
rules as to tenant of, apply to under-tenant of, *id.*
widow of tenant of, marrying during widowhood, *id.*
tenant of, letting and dying immediately, 46
apportionment of rent, *id.*, 47
rights of tenant of, to take estovers, or botes and profits, 47
powers generally of tenant of, *id.*, 295, 510
waste, voluntary and permissive, *id.*, 48—53
rights of tenant of, to timber, 48—53
timber on, what it is, *id.*, 49
tenant of, without impeachment of waste, 50—53, 58
reversioner or remainderman of, his remedy for waste, 50—51
powers of tenant of, under Leases and Sales of Settled Estates Act, 1856, and Settled Estates Act, 1877, stated generally, 54
IMPROVEMENTS by tenant of—draining, irrigation, embanking, reclaiming, making roads, railways, &c., 54, 57, 515, 520 *et seq.*
sale or exchange of land subject to, 54 *et seq.*, 515
power of tenant of, to grant leases, 58, 445, 446, 511, 513 *et seq.*
power of tenant of, under Settled Land Act, 1882, 58, 59, 513 *et seq.*
tenant of, INFANT, MARRIED WOMAN, or LUNATIC, 58
conveyance by tenant of, to give title for benefit of creditors, 59
how far determinable on tenant's bankruptcy, 110
joint tenants of, 228
tenant of, entitled, although estate encumbered, 447
powers of tenant of, for SALE, ENFRANCHISEMENT, PARTITION, EXCHANGE, under Settled Land Act, 1882, 55, *et seq.*, 238, 510 *et seq.* 515, 523
transfer of incumbrances on, 56, 511
tenant of, cannot sell mansion house without consent of trustees or an order of Court, 57, 514
tenant of, may where necessary deal only with surface of land, 58, 296, 515
tenant of, may mortgage settled land for purposes of enfranchisement or equality of exchange, 515
contracts into which a tenant of, may enter, 56, 58, 238, 523
contract by, not to exercise his powers under the Settled Land Act, 1882, is void, 63, 530
assignee for value of, *id.*
prohibition or limitation in settlement of life tenant's statutory powers is void, *id.*

LIFE ESTATE—*continued.*
tenant of, in no case liable to forfeiture for exercising his powers, 59, 531
tenant of, is trustee for all parties interested, 56, 58, 531
protection to *purchasers, lessees, mortgagees,* &c., of, *id.*
exercise of statutory powers and authorities by tenant of, *id.*, 532
settlor of, may confer on tenant larger powers than given by Settled Land Act, 1882, 58, 59, 238, 532
other limited owners of land, which have same powers as tenant of, under the above Act, 60, 76, 77, 128, 532

LIGHT AND AIR,
right to, an incorporeal hereditament, 7, 351
right to, 355—358

LIMITATION, STATUTES OF, 363
principles of, *id.*
history of, *id.*
enumerated, *id.*
'adverse possession,' what it is, 364
Crown—*Nullum Tempus* Act, *id.*
'rent' includes all heriots, *id.*
general meaning of 'rent' under, *id.*
rent reserved on a lease, 365
actions on covenant for rent or debt, 111, n. (*s*), 179, 366, 379
lessor's right to recover possession, 366
right of mortgagee out of possession under, 179, 364, 367, 368
action of foreclosure, 368, 369
what is a 'payment' by which a case is taken out of, 370
action of foreclosure is one for recovery of land within, *id.*
their connection with mortgages, stated by Lord Selborne, 371—375
as to distress, or ejectment, 375
REAL PROPERTY LIMITATION ACT, 1874, 37 & 38 Vict. c. 57; 375. *See* the STATUTE set forth in Appendix, 387—391; *and* TABLE OF STATUTES.
actions for recovery of land or rent to be brought within twelve years, 376, 388
actions for recovery of estates in reversion and remainder, when to be brought, *id.*
right to recover land accruing to person under disability, 377, 388, 389
the utmost period now allowed for bringing action in any case is thirty years, 377, 389
as to tenant in tail, *id.*, 378, 389
as to mortgagor, when mortgagee in possession, *id.*, 170, 390
money charged upon land (including bond collateral to mortgage) and legacies, *id.*, 379, 390
money and legacies so charged and secured by special trust, 379—391
difference between an *express* and a *constructive* trustee under Act of 1874, 379
do not affect right of *cestui que trust* against an *express* trustee, *id.*, 380, 391
provisions in as to FRAUD, 380—383
'acquiescence,' 'laches,' 384
title barred by lapse of time, *id.*, 385
title once extinguished by, is destroyed, 385

LIMITATION, STATUTES OF—*continued.*
operation of, where mortgagor in possession pays debt but takes no reconveyance, 385
Real Property Limitation Act, 1874, to be read with 3 & 4 Wm. IV. c. 27, 179, 368, 380, 391

LIS PENDENS, 105 *et seq.*, 190

LIVERY IN DEED, IN LAW, 276 *et seq.*

LIVERY OF SEISIN, 20, 45, 245. *And see* SEISIN.
required to convey freehold at Common Law, 40 n. (*h*), 212, 274
on lease for life, and conveyance of reversion on term of years, 203, 278, 281
estates in expectancy, and incorporeal hereditaments, now lie also in grant, 86, 203, 279, 281

LUNATIC,
tenant for life, 59, 534
tenant in tail, 74
conveyance by, 112, 113
committee of, *id.*, 114
trustee or mortgagee, 113, 270, 271
care of, by Lord Chancellor, and Judges of Supreme Court, *id.*
Statute of Limitations as to, right of, 377
provisions concerning, under Land Transfer Act, 1875, 422
provisions concerning, under Settled Estates Act, 1877, 446

MAGNA CHARTA, 24, 65, 92, 112

MANORS. *See also* COPYHOLDS.
origin and history of, 30, and n. (*t*)
lord of, a seignorial and judicial functionary, *id.*
courts of, how constituted,—survive to present day, *id.*, 31
custom of, 31, 32
court roll of, 32
ancient demesne and customary freehold, *id.*
rights of lords of, how protected under Settled Estates Act, 1877, 447
what included in term, 451, 510
stewards of, 510
sale under Settled Land Act, *id.*
'general words' applicable to, 358, 456

MANSION HOUSE,
things annexed by special custom to, 7
new, or added to, by tenant for life, 55
on settled land, can be sold or leased by life tenant, only by consent of trustees or an order of the Court, 57, 58, 514

MARRIED WOMAN. *See also* HUSBAND AND WIFE.
tenant for life, 59
power of Court to bind interest of, 119, 309, 478
power of attorney of, *id.*, 315, 479
acknowledgment of deeds by, 501 *et seq.*
how affected by the Settled Land Act, 1882, 119, 533, 534
capable of holding property and contracting like *feme sole*, 116, 120, 324, 539, 546

MARRIED WOMAN—*continued.*
property of, now held by her as if she were a *feme sole*, 539
loans by, to husband, 539
execution of general power by, 310, 540
property acquired by, after Married Women's Property Act, 1882, though married before, 116, 324, 540
stock, &c., to which, is entitled, 540
stock, &c., to be transferred to, *id.*
investment in joint names of, and her husband, 541
investment in joint names of, and others, *id.*
stock standing in joint names of, and others, *id.*
fraudulent investments by, with husband's money, *id.*
effect of insuring her life for benefit of her husband or children, 543
remedies of, for protection, &c., of her property, 117, 543
ante-nuptial debts of, *id.*
liability of husband for ante-nuptial debts of, *id.*
and husband may be jointly sued for tort or contract of wife before marriage, 544
fraudulent dealings by, with husband's property, *id.*
questions between, and her husband may be decided in a summary way, *id.*, 117
as an executrix and trustee, 545
past or future settlements of, not affected by Married Women's Property Act, 1882, 116, 118, 324, 545. *See* SETTLEMENT.
liable to parish for maintenance of her husband and *her* children, 546
legal personal representative of, *id.*

MARRIED WOMEN'S PROPERTY ACT, 1882, 45 & 46 Vict. c. 75. *See* APPENDIX, 538—550, *and* TABLE OF STATUTES.

MARSHALLING ASSETS, 327

MAXIMS, &c.,
"*Cujus est solum, ejus est usque ad cœlum*," 5
"*Quicquid plantatur solo, solo cedit*," 11
"The principal thing 'shall not be destroyed by the accessory,'" 12
"*Mobilia sequuntur personam*," 16
"The father to the bough, the son to the plough," 29
"Every grant is to be construed most strongly against the grantor, unless in the case of grants by the Crown," 41, 42
"*Qui sentit commodum, sentire debet et onus et transit terra cum onere*," 50
"*Nemo hæres viventis*," 129
"*Seisina facit stipitem*," 130
"*Id certum est, quod certum reddi potest*," 146
"Once a mortgage always a mortgage," 180
"*Qui prior est tempore potior est jure*," 190
"*Jus accrescendi præfertur ultimæ voluntati*," 235
"Equity follows the law," 251, 260
"*Pares debent interesse investituræ feudi, et non alii*," 277
"*De minimis non curat lex*," 302
"*Delegatus non potest delegare*," 309
"*Impotentia excusat legem*," 325
"*Nullum tempus occurrit regi*," 364

MERGER, 146. *See* LEASEHOLDS.
of reversion in estate of possession, 204
no, in estate tail, *id.*

MESNE LORDS, 24. *See* CROWN.

MESNE PROCESS,
outlawry on, abolished, 40 n. (*c*)

MINES, MINERALS,
included in 'Lands,' 5
generally excluded on purchase by railway company, 6
opening, voluntary waste, 47
leases of, by tenants for life, 58
trustees cannot reserve, when they sell land, unless empowered, 295
Court may authorise under Confirmation of Sales Act, 296
may be excepted from sale of land, under Settled Estates Act, 296, 439
under Settled Land Act, 296, 511, 515
payments on leases of, under Settled Estates Act, 1877, 49, 442
under Settled Land Act, 1882, 49, 509, 524

'MINING LEASE,'
defined, 452
regulations as to, 58, 512 *et seq.*

MONEY,
to be laid out in lands or leaseholds, a hereditament, 6, 7
charged upon land, deemed to be paid after non-receipt of interest for twelve years, 378. *See* LIMITATION, STATUTES OF.
capital, under Settled Land Act, 57, 517 *et seq.*

MORTGAGEE. *See* MORTGAGE, PURCHASER.
title-deeds in hands of, regarded as personalty, 14
covenants by, 280
general devise by, 337
devolution of estate at death, 199, 268, 337, 474
out of possession, in connection with Statutes of Limitation, 179, 364, 367, 368
in possession, in connection with Statutes of Limitation, 170, 378, 390
obligation on, to transfer instead of reconveying, 197 *et seq.*, 466, 504
secus as to, in, or having been in possession, *id.*
leasing powers of, in possession, *id.*, 183, 468
general powers incident to estate or interest of, SALE, INSURANCE, RECEIVER, TIMBER, 181 *et seq.*, 298, 468—472
how protected, in dealings under Settled Land Act, 58, 531

MORTGAGOR,
bankruptcy of, 182
in possession, who pays off debt but takes no reconveyance, acquires legal estate after thirteen years, 385
power for, to inspect title-deeds, 177 n. (*t*), 466
leasing powers of, in possession, *id.*, 174 *et seq.*, 468
power of sale by, 177, 455
right of, to require mortgagee to assign debt, 197, 466
extended to succeeding incumbrancers, 198, 504

MORTGAGE. *See also* FORMS.
on what principle formerly framed, 10, 160
of title-deeds, 14, 181
of settled property for benefit of creditors, 60
debt, 105, 153, 179, n. (*c*), 379
by demise, 160, 163, n. (*rr*)
defined, origin of word, 174, 178
of freeholds, 174 *et seq.*,—of leaseholds, 153 *et seq.*
made after December 31, 1881, 177, 468 *et seq.*
before January 1, 1882, *id.*
power to sell land subject to, 177, 181 *et seq.*, 465, 468
in equity, 178
mortgagor's equity of redemption, *id.*, 179, 180, 186, 188, 189
statutory limits of mortgagee's rights, 179
the rule, 'once a mortgage always a mortgage,' 180
notice of repayment of debt, *id.*
equitable, what it is, 181
foreclosure, *id.*, 182, 368
sale under order of Court, 182
sale under terms of deed, *id.*, 183
mortgagee entering into possession, 183
mortgagee's power over timber, *id.*
mortgagee's power to appoint a receiver, *id.*, 184, 185
insurance of property subject to, 185
remedies of mortgagee, *id.*, 186
descent or devolution of equity of redemption, 186
Locke-King's Act, *id.*
meaning of, under same Act, 187
direction in will as to, *id.*, 188
alienation of equity of redemption, 188 *et seq.*
tacking, 189, 190 *et seq.*
'mesne incumbrance,' 189, 193
equity of redemption of, purchased or itself mortgaged, 193
right to consolidate, and restriction thereon, *id.*, 193, 196, 466
notice of mesne incumbrance prevents tacking, *id. et seq.*
covenants of title by mortgagor, 153, 154, n. (*e*), 196
reconveyance of property once subject to, 197 *et seq.*
mortgagee when debt satisfied is a trustee for mortgagor, 264
how affected by Statutes of Limitation, 368 *et seq.*
of registered lands, 406, 407
what term includes, 196, n. (*g*), 451
'incumbrance' includes, in fee, 452
actions respecting, 181, 185, 472
STATUTORY, 196, 473, 474
sum advanced on, by persons jointly, 486
deed of statutory (form), 493
life tenant's power to, settled land, 515, 516, 527

MORTMAIN, 67, 90
Statutes of, 67, 91 *et seq.*, 248 *et seq.*
Act, 94 *et seq.*
exemptions from Act, 96 *et seq.*

'NAME AND ARMS' CLAUSE, 173

NAVIGATION COMPANY,
shares in New River and Avon, held to be realty, 15 n. (*y*)

NEXT PRESENTATION,
devise of, to trustee, 339
distinguished from advowson, 347

NOTICE, 142, 149, n. (*c*), 150, n. (*k*), 282, n. (*u*). *See also* MORTGAGEE.
yearly tenancy determinable by, 140
under Agricultural Holdings Act, 143
actual or constructive, to intending purchaser of land that it has been sold, 269, 270
disregard of such, equal to a breach of trust, 270
under Land Transfer Act, 1875, 423
of application to Court under Settled Estates Act, 1877, to trustees, 441
under Settled Land Act, 1882, 56, 58, 238, 527
under Conveyancing Act, 1881, 490
restriction on constructive, under Conveyancing Act, 1882, 270, 500

NULLUM TEMPUS ACT, 9 Geo. III. c. 16, amended by 24 & 25 Vict. c. 62. *See* the TABLE OF STATUTES.

'OCCUPANT (GENERAL), (SPECIAL),' 43, 485

OFFICE, Estate in, 165, n. (*c*)

ORCHARD,
when passed by grant of house, 5

ORDERS AND RULES OF COURT, 548—569. *See also* RULES and FEES.

ORES,
included in 'Land,' 5

OUT-BUILDINGS,
if enjoyed with house, pass by grant of messuage, 5

OUTLAWRY,
forfeiture and escheat of lands, &c., consequent upon, 23, 40
meaning of, 40 n. (*c*)
on mesne process abolished, *id.*, *ib.*

OWNERSHIP. *See* ESTATE.
four kinds of, 39, 227

PARAMOUNT,
king styled lord, in feudal system, 24
sovereign is still in theory lord or lady of soil, 35, 38, 82
theory practically operates where land escheats to Crown, *id.*, *ib.*

PARTITION. *See* ESTATE, SETTLEMENT.

PARTNERSHIP,
land held in, for trade purposes regarded as in the nature of personalty, 14
nature of share in, where land is concerned, 14 n. (*t*)
right of partner to have land sold, in order to realise his incumbrance on it, *id.*
railway company, 15

PATENTS, 8

PAYMENT INTO COURT,
regulations as to, under Conveyancing Act, 1881, 490
Settled Land Act, 1882, 57, 527

'*PER FORMAM DONI*,'
meaning of phrase, 78

'PERNANCY,'
meaning of term, 252

PERPETUITIES,
rule against, 97 *et seq.*, 220, 222
Thellusson Act, 99 *et seq.*
rule against, in connection with POWERS, 305 *et seq.*

'PERSON,'
includes a corporation, 33, 399, 452, 510

PERSONAL PROPERTY,
real property held by trading company deemed to be in nature of, 15
included in 'property' under Conveyancing Act, 1881, *id.*
of intestate devolves on administrator, *id.*
governed by the law of owner's domicile, 16
no 'tenure' or 'holding' of, 17, 39, 79
legal right to, ordinarily determined by possession, 17
transfer of, 39, 256
must be vested in trustees in order to create successive interests, *id.*, 79
no estate tail in, 79
settled on trusts similar to estates of freehold, *id.*
constructive conversion of realty into, 80, 534
chattels real classified as, 9, 137
chattels real possess incidents of, 138
general bequest of, includes property subject to a power of appointment, 311

PETIT SERJEANTY, 27

PICTURES,
not real heirlooms, 7
tenant for life may sell by order of Court under Settled Land Act, 1882, 59
to be held as heirlooms 'in strict settlement,' 79

PLATE,
cannot be an heirloom, but a chattel in the nature of an heirloom, 7
tenant for life may sell by order of Court under Settled Land Act, 1882, 59

PORTIONS,
raising, for younger children, 160, 161

POSSESSION,
estate in, contrasted with one in *expectancy*, 201
meaning of term, *id.*
estate in, can exist only as separate estate, 203 *et seq.*
'adverse,' 364

POSSIBILITY OF ISSUE,
presumption of law as to, 63, and n. (*c*).
tenant in tail after, extinct, *id.*, 60
a life tenant under Settled Estates Act, 1877, and Settled Land Act, 1882, 435, 533

POWERS, 289—317
distinction between, and *estates*, 289
instances of, *id.*, 290
over uses, 290
with or without interest, *id.*, 291
reserved in settlements of landed property, 291
and estates may co-exist in same person, *id.*, 292
employed to bar dower, *id.*
merger and extinguishment of, 293
of revocation in settlements, &c., *id.*, 294
execution of, cannot be revoked unless power of revocation be reserved, 294
of revocation and new appointment, *id.*
special, *id.*
of sale and exchange, *id.*, 296
generally take effect under Statute of Uses, 297
Common Law, *id.*
Equitable, 298
donee of, where he may appoint in his own favor, *id.*
to married women and infants to appoint, *id.*
operating under Statute of Uses, enumerated, 299
collateral, '*relating to the land*,' *appendant*, *in gross*, *id.*, 300
extinguishment, suspension and release of, *id.*
donee of, may by deed release or contract not to exercise, 301, 484
donee may disclaim, *id.*, 501
of appointment in favor of children, *id.*
exclusive and *non-exclusive*, *id.*, *et seq.*
general rules as to exercise of, 304
cannot be exercised to create a perpetuity, *id.*
limitations created under exercise of, treated as taking effect under instrument creating, *id.*, 305
effect of rule on conveyance on fee-farm rent, 305
general and *special*, *particular* or *special*, *id.*, *et seq.*
excessive execution of, 308
valid appointment to persons not object of power, *id.*
to separate use of married woman, *id.*
delegation of, 309
involving exercise of discretion can be executed only by donee himself, *id.*
bankruptcy of donee of, *id.*, 310
judgment debts of donee of, 310
general, to appoint by will, *id.*, 311
effect of execution of general, by married woman by will, 310, 322, 324
general devise includes estates subject to *general*, 311, 326
execution of, *id.*
mode of execution, 312
execution of, by *deed* or WILL, *id.*, 310, n. (*z*
defective execution of, when relieved in equity, 313

effect of s. 33 of the Will Act on general power 325, 326.

POWERS—*continued.*
defective execution relieved by statute, 314
lessor's covenants in leases under, *id.*
of attorney, *id.*, 315—317, 483 *et seq.*, 503
in connection with lapsed gifts by will, 324
execution under, of attorney, 309, 316, 483

PRESCRIPTION,
title to incorporeal hereditaments, depends upon, or upon grant, 351, 353 *et seq.*
how distinguished from custom, 352

PRESCRIPTION ACT, 2 & 3 Wm. IV. c. 71. *See* the TABLE of STATUTES.

PRESENTATION. *See* ADVOWSON.

PRETENCED RIGHT, 219, n,(*d*)

PRIMER SEISIN, 23, 24

PRIMOGENITURE,
history of rights of, 28, 129

'PROFITS *À PRENDRE*,'
term defined, 351
who cannot claim by custom, 352
extinguishment of, 358

PROPERTY,
how, may be considered, 1
distinguished from interest, *id.*
law of, what it deals with, *id.*
rights of, described, 2
how CLASSIFIED in the early ages of Europe,
in Roman law, *id.*
under the feudal system, *id.*
after the Norman Conquest, *id.*
after 12 Car. II. c. 24, *id.*
movable and immovable, 2, 3, 8
PERSONAL, defined, 4
lands, tenements, and hereditaments, *id.* *See* these Titles.
may at same time be *real* for one purpose, *personal* for another, 14
used for purpose of trade, *id.*
real, owned by partners in trade, part of their common stock, and in nature of personalty, *id.*
descent or distribution of, 15
now classified into freehold, copyhold, and leasehold, 33
how, may escheat to Crown, 22, 35, 82
what included in term by Conveyancing, &c., Acts, 1881 and 1882, 15, 451, 498
lex situs, and law of owner's domicile, how they respectively affect, 16
meaning of term in The Married Women's Property Act, 1882, 547

PROSPECT,
right to, how acquired, 356

PROTECTOR OF SETTLEMENT, 73, 75

'PROVISO FOR CESSER,' 161

'PUBLIC POLICY,' 89 *et seq.*

PUR AUTRE VIE,
cestui que vie, 40
described, 42, 43
general and special occupant, 43, 44
tenant may devise estate, 44
Wills Act, concerning estates, *id.*
devisee of estate, dying intestate leaving heirs, *id.*
dying without heirs, *id.*, 45
preventing concealment of death of *cestui que vie*, *id.*
tenant, his right to emblements, 46
in tail, 78
tenant, his rights under The Settled Land Act, 1882, 532

'PURCHASE,' 'PURCHASER.' *See also* NOTICE.
meaning of, 130, 131, 132
descent to be traced from, *id.*, 131
settlor of land when to be deemed, 131
meaning of, in Conveyancing Acts of 1881 and 1882, 316, n. (*z*), 452, 498
how protected in dealings under Settled Land Act, 1882, 58, 531
protection generally against fraud, 188
affected by judgments, Crown debts, *lis pendens*, annuities, 103—106, 360
duty of, on sale by executor, 341, n. (*l*)

QUARE IMPEDIT,
real action of, retained by 3 & 4 Wm. IV. c. 27, s. 36, 3
effect of not bringing writ of, in due time, 385

QUASI-ENTAIL, 78, 79

QUIA EMPTORES,
effect of Statute of, 33, 34, 36, 40, 82, 87, 93, 361. *And see* TABLE OF STATUTES.

QUIET ENJOYMENT,
covenant for, implied, 153, 176, 280, 457, 458

QUIT RENTS,
described, 360
redemption of, and other perpetual charges, 482

RACK-RENT,
how tenant at, compensated for emblements where tenant for life dies, 11, 46
tenant for life may grant leases at, 58, 148
meaning of term, 76

RAILWAY. *See also* MINES AND MINERALS.
land of, how regarded, 15
shares in, are of the nature of personal property, *id.*
rateable as land, *id.*
profits of, personalty, *id.*
'improvements' on life estate by, 54

REAL ESTATE,
when regarded as in the nature of personalty, 14, 15
of intestate, unless settled or devised, devolves on heir, 15
inheritance of, governed by *lex situs*, 16
no absolute ownership in, 39
subject of tenure, *id.*
settlement of, when children to take equally, 80
constructive conversion of, into personalty, *id.*
will of, 318—342. *See* WILL.
residuary devise of, is specific, 326, 327
whether devise of, will pass leaseholds, 138

REAL PROPERTY LIMITATION ACT, 1874, 37 & 38 Vict. c. 57, in Appendix, 387—391. *See* LIMITATIONS, STATUTES OF; and TABLE OF STATUTES.

RECEIPT. *See* DEED.

RECEIVER,
power of mortgagee to appoint, 183, 468, 471, 472

'RECOVERY,'
meaning of, 67, 74, 287
term 'vouchee,' in connection with, 68, 70

RECOVERY OF LAND,
action for, 365. *See* EJECTMENT, 3

REGISTRATION, 86 n. (*u*)
of conveyances, 86, 104, 105. *See* TITLE.
of debts, 106
effect of omitting, of will devising lands in Middlesex or Yorkshire, 394
under Land Transfer Act, 1875, 87, 400
certificate of, under Land Transfer Act, 1875, 401
of leaseholds, 401—406
mortgage of lands in, 406, 407
unregistered dealings with land subject of, 412
cautions against dealings subject of, 413, 414
power of Court or registrar to inhibit registered dealings, 414
proprietor's power to impose restrictions, *id.*
caution against, of land, 415
of Crown lands, 416
of land below high-water mark, *id.*
proceedings on and before, *id.*
of lands of different tenures, 417
trustees may sell through medium of registry, *id.*
of part owners, *id.*
instruments and facts to be disclosed on, *id.*, 418
notice of, to be marked on deeds, 418
costs, &c., on, *id.*
of special hereditaments, 420
of title, enactments as to, *id.*, 421
conditions of purchase and sale which may be registered, 421
fraud connected with, 424
rules as to powers of registrar, fees, &c., &c., 425—428
meaning of 'Court' in connection with, 428
in DISTRICT REGISTRIES, 429, 430
in LOCAL REGISTRIES, 432

RELEASE. *See also* LEASE *and* RELEASE.
definition of, 282
effect of conveyance by, *id.*
operative words of,—must be by deed, 283
by joint tenant, 234
of powers, 299 *et seq.*
of easements and profits *à prendre*, 358
RELIEF, 21, 35
REMAINDER,
estate tail in, how entail of barred, 73
quasi-entail in, how barred, 79
estate in, how conveyed at Common Law, 85, 86
estate in, how differs from one in *reversion*, 207, 211
defined and explained, 208, 225
when right to, accrues, 208
rule in *Shelley's Case*, 209 *et seq.*
no tenure exists between owner of particular estate, and person entitled in, 211
means of creating future estates of freehold, 211 *et seq.*
dower and *curtesy* when attaching to estate in, 213
merger of estates in, with particular estate, *id.*
cestui que vie, may be ordered to be produced, 214
cestui que vie, when assumed to be dead, *id.*
is either VESTED or CONTINGENT, *id.*
vested and *contingent* defined, *id.*, 225, 226
illustrations of contingencies, 215
contingency with double aspect, 216
how *contingent*, may become vested, *id.*
contingent, how created, *id.*
contingent, how destroyed, 217, 218, 260
contingent, trustees to preserve, 218, 260, 261, 263
contingent, how alienated, *id.*, 219
devise whether vested or contingent, 219, 220
creation of, must not transgress the law against perpetuities, 220
period within which estate in, must take effect, *id.*
doctrine of *cy-près*, *id.*
CROSS-REMAINDERS, 242
cannot be implied in a deed, 243
contingent, now take effect as executory interests, 263
Statute of Limitations as to recovery of, 376, 388
REMAINDERMAN,
of life estate, his remedy for waste, 51
interests of, how protected under Settled Land Act, 1882, 56
RENT,
an incorporeal hereditament, 7, 359
no apportionment of, at Common Law, 46
now apportionable, *id.*, 47, 155
Statute of Frands on, of lease, 141
payment of, its effect on tenancy at will, *id.*, 142
and covenants of lease, 148 *et seq.*, 157
increase of, 158
incident of a reversion, 205 *et seq.*

RENT—*continued.*
different kinds, 359
includes all heriots under 3 & 4 Wm. IV. c. 27, 364
does not include rents reserved on leases for years under same Act, 365
discontinuance of receipt of, what it is, 375, 376
registration of under Land Transfer Act, 1875, 420
what term includes, 452, 509

RENT-CHARGE, 161, 273
now substituted for tithes in kind, 345. *See* TITHES.
is an incorporeal hereditament, 359
action in respect of, 361 n. (*d*)
formerly could not be apportioned, 362
release from a, *id.*
mortgage of, 368
remedies for recovery of, and other annual sums charged on land, 359, 361 n. (*d*), 481, 482

RENT SECK,
power of distress incident to, 359

'RENT SERVICE,' 205

RENTS AND SERVICES,
under feudal system, 6, 25, 35
RENT, an incorporeal hereditament, 7

REVERSION OR REVERSIONARY INTEREST. *See also* SETTLED ESTATES ACT, 1877
lessors, 147—150, 152
assignee of, 149 n. (*e*), 150, 207
what benefits go with, 151 *et seq.*
grantee of part of, 154
severance of, 155
explanation of term, 202, 225
estates in, *id.*
particular estate—freehold—chattel interest, *id.*
dower, and curtesy in estate in, 203
alienation of, *id.*
strictly an incorporeal hereditament, *id.*, 343
estate in can exist only as separate estate, *id.*, 204
estate in, merges in one of possession, except in case of estate tail, 204
incidents of—fealty—rent, 205
'rent service' defined, *id.*
attornment, 206
distress, 206
condition of re-entry, *id.* *See* ENTRY, RIGHT OF.
destruction of, 207
Statutes of Limitation as to recovery of, 377
where, in Crown, Settled Estates Act, 1877, does not apply, 447
assign of term of years cannot call for title to leasehold, 282, 453
lessor's and lessee's covenants run with, 151,152,156,171,177,207,314,463,464
application of money paid for, under the Settled Land Act, 1882, 58, 524

REVERSIONER,
of life estate, his remedy for waste, 51
interests of, how protected under Settled Land Act, 1882, 55
of estate tail, how interest destroyed, 73
Crown is, of entails granted for reward of public services, 72
is not to be injured by sale of land by trustees reserving the minerals and timber, 295

RULES, FORMS, FEES, &c., &c,
under Judicature Act, 72, 95, 106
under Settled Land Act, 1882, 49 n. (*u*), 548—557
under Fines and Recoveries Act, 3 & 4 Wm. IV. c. 74, 558—560, 567
rules under Conveyancing Act, 1882, sect. 2, 560, 561
rules and forms under Conveyancing and Law of Property Act, 1881, as to *Powers of Attorney* and *Searches*, 561—567
Court fees, under above Act, sect. 48, 568, 569

SALE,
power of Court to order, of settled estate, 54, 438
power of tenant for life to effect, or EXCHANGE, of life estate, 55, 56
power of trustees to effect, or EXCHANGE, of settled land, 294
conducted under Powers of Attorney, 307 n. (*h*), 317
payment and application of moneys arising from, under the Settled Estates Act, 1877, 49 n. (*u*), 442
contracts for, generally, 453, 454; *and see* 160, 282, 316
discharge of incumbrances on, 117, 197, 455
mortgagee's power of, 182, 185, 298, 468 *et seq.*
by life tenant, of settled land, 56, 76, 238, 510
payment and application of moneys arising from, under Settled Land Act, 1882, 57, 517 *et seq.*
of timber, by tenant for life, impeachable for waste, 48, 49, 296, 524
settlement by way of trusts for, 80, 534 *et seq.*

SALES, CONFIRMATION OF, ACT, 25 & 26 Vict. c. 108. *See* TABLE OF STATUTES.
SCOTLAND,
The Vendor and Purchaser's Act, 1874 (p. 394); The Land Transfer Act, 1875 (p. 399); The Settled Estates Act, 1877 (p. 433); The Conveyancing and Law of Property Act, 1881 (p. 448); The Conveyancing Act, 1882 (p. 497); The Settled Land Act, 1882 (p. 505), and The Married Women's Property Act, 1882, do *not* extend to

SCUTAGE OR ESCUAGE, 21,

SEARCHES, 106,
rules, &c., of Court as to, 561—567
SECURED CREDITOR, under bankruptcy, 111.
SEISIN,
livery of, 20, 40 n. (*h*). *See* that Title.
technical meaning of, referred to, 130, 132, 133, 138, 139, 245 *et seq.*

SEPARATE ESTATE, 114 *et seq.*, 118 n. (*a*), 119, 308. *See* MARRIED WOMAN.

SERVICES,
under Feudal System, 25—27, 35

SETTLED ESTATES ACT, 1877, 40 & 41 Vict. c. 18 ; set forth in Appendix, 433—448, and *see* various Titles, *and* TABLE OF STATUTES.

SETTLED LAND ACT, 1882, 45 & 46 Vict. c. 38 ; set out in Appendix, 505, 537, and *see* appropriate Titles, *and* TABLE OF STATUTES.
application of capital money under, 57, 517 *et seq.*

SETTLOR,
of land to be accounted 'purchaser,' 131
Court under Settled Estates Act, has no power which, did not possess, 443

SETTLEMENT. *See also* INFANT.
meaning of term under Leases and Sales of Settled Estates Act, 1856, and Settled Estates Act, 1877, 54, 435
protector of, 73 *et seq.*
of estate tail, 74 *et seq.*
of personalty on trusts similar to estates of freehold, 79
'STRICT,' 79, 259, 260
of realty, by way of trust for sale, 80, 534 *et seq.*
voluntary, 107 *et seq.*, 110 n. (*r*)
post-nuptial, of lands belonging to wife, 109 n. (*s*)
Bankruptcy Act and, 109
descent of land in, 131
posthumous children take under marriage, 129, 215
acquiring land by marriage, 132
power of revocation and new appointment in, 294
special powers in, *id.*, 295
power of partition, 238, 295
power of Court to authorize lease of land in, 54, 435
Court has no power as to, which settlor did not possess, 443
meaning of, under Settled Land Act, 1882, 56, 508
estate or interest not disposed of by, how affected by Act, *id.*
power of Court to appoint trustees of, where none exist, 525
clause limiting powers of tenant for life, under Settled Land Act, void, 59, 530
may *confer larger* powers on tenant for life than the Act does, 56, 59, 238, 532

SHARES,
in the funds and public companies, 8
in canal, 15 n. (*y*)
in waterworks, 15
in navigation company, *id.*, and n. (*y*)
partnership, in land. *See* PARTNERSHIP.

SHELLEY'S CASE,
RULE IN, 209 *et seq.*
SOLICITOR, 188. *See* PURCHASER.
protection of, adopting Conveyancing Act, 1881, 489

SOVEREIGN. *See* PARAMOUNT.
SPECIFIC PERFORMANCE, 275 n. (*ee*)
under Land Transfer Act, 1875, 423

STATUTES. *See* TABLE OF STATUTES CITED.

STATUTE, MERCHANT,—STATUTE, STAPLE,
estates by, 103 n. (*y*), 199, 200

STOCK, 8
included in 'securities,' 510

SUBINFEUDATION,
described, 19, 20
mesne lords in system of, 24
existed in England for 200 years, 33
abolished by statute of *Quia Emptores*, *id.*, 34

SUPERSTITIOUS USES, 95

SUPPORT,
of lands, &c., right of owner to, 358 n. (*f*)

SURRENDER of LEASE. 51, 514, 245, 15, 146, 207, 275

TACKING,
doctrine of, 189, 190 *et seq.*
how affected by Vendors' and Purchasers' Act, 1874, 393, 394

'TAIL,'
meaning of legal term, 61
an estate, defined, &c., *id.*
heir in, found only in descending line, *id.*
general gift in, 'to A. and the heirs of his body,' *id.*
qualified gift in, to heirs male or female, *id.*
gift in, how affected by customs of Gavelkind and Borough-English, 62
male, female, special, *id.*, 132
duration of estate in, *id.*
reversion of estate in, *id.*
how estate in, converted into a fee simple, 63
tenant in, after possibility of issue extinct, 60, 63
estate in, is a freehold, 39, 63
estate, created by deed and by will, 63
words of inheritance and procreation were necessary to create estate in, *id.*
what words required to create entail by (i.) deed, (ii.) by will, 64
historical development of estate in, *id.*
conditional fee, 64, 85, 165
alienation of estate in, 65 *et seq.*, 72
statute *De Donis*, as to, *id. et seq.*, 71, 72, 204, 257
alienation in mortmain applied to estates in, 67
'recovery,' *id. et seq.*, 71 *et seq.*
Taltarum's Case, 68
'fine,' 69
abolition of fines and recoveries, 71 *et seq.*
how entail *in possession* barred, 72
how barred when *in remainder*, 73, 75
protection of estate, *id.*
base fee, how created, *id.*
lunatic tenant in, 74
trustee, and *cestui que trust* of estate, *id.*

'TAIL'—*continued.*
family settlement of estate, *id. et seq.*, 260
powers of tenant in, under Settled Land Act, 1882, 76
sale or exchange of estate, *id.*
incidents of estate, *id.*
leases granted by tenant in, *id.*, 77
debts of tenant in, 77
'actual delivery,' meaning of, *id.*
judgment creditor of tenant in, 77, 78
bankruptcy of tenant in, 78
forfeiture by tenant in, abolished, *id.*
quasi-entail, 78, 79
personalty cannot be held in, 79
leaseholds, chattels, &c., settled on trusts analogous to estates of freeholds, *id.*, 80
'strict settlement,' *id.*, 80, 260
settlement of realty by trust for sale, 80, 534
married woman barring entail, 118
intestacy of tenant in, 132
descent of estate, rules as to, 130 *et seq.*
no merger in, 204
inheritances in, after joint tenancy for life, 228
effect of a preceding gift in, on section 29 of Wills Act, 341, 342
Statute of Limitations as to tenant in, 377, 378
tenant in, his rights under the Settled Land Act, 1882, 76, 77, 532

TENANT AT WILL, 137, 139 *et seq.* *See* ESTATE.

TENANT FOR LIFE. *See* LIFE ESTATE.
distinguished from tenant for a term, 1
defined, by Settled Land Act, 1882, 592

TENANT IN FEE. *See* FEE SIMPLE.

TENANT IN TAIL, 61 *et seq.* *See* TAIL.

TENEMENTS,
meaning of term, 6, 24
included rent, 6

TENURE,
real property alone (and offices) subject of, 17, 165 n. (*c*)
by subinfeudation, 19, 24
meaning of term, *id.*, *id.*
in capite, 24
present great division of, is into freehold and copyhold, and leasehold, 33
in fee, its incidents at present day, 35
in tail, *see* TAIL.
Frankalmoign, 35, 36
Frank marriage, 36
by curtesy, 60. *See* CURTESY OF ENGLAND.
at will, 137, 139, 142. *See* ESTATE.
for years, *id.*, 143
by sufferance, *id.*

TENURE—*continued.*
from year to year, 140
yearly, determinable by notice, *id.*
form of yearly, *id.*
yearly, not determined by assignment or death, 142. *See* LEASEHOLDS.
none between owner of particular estate and remainderman, 207, 211
'USE,' not the subject of, 249

TERM OF YEARS, 10, 133, 218 n. (*z*). *See* LEASE, LEASEHOLDS.
estate for, is a chattel interest, 41, 137, 143, 147
to secure portions, 166
enlargement of long, into fee simple, 163, 487, 488

'TERMOR,' 147

TERRE TENANT, 33

TIMBER,
cutting down, voluntary waste, 47
what included in term, 48 *et seq.*
rights of tenant for life as to, *id.*
'good husbandry' in regard to, 52
tenant for life 'unimpeachable for waste,' his rights as to, *id.*, 53, 54
tenant in tail, his power over, 76
not referred to in Thellusson's Act, 101
mortgagee's power to cut, 183, 468
trustees, unless expressly empowered, or under order of Court, cannot sell land without, and allow *cestui que trust* unimpeachable for waste to sell it, 295
Court may order sale of, on settled estate, 58, 438
tenant for life 'impeachable for waste,' his power over, 48, 49, 296, 524

'TIME IMMEMORIAL,'
meaning of phrase, 354 *et seq.*

TITHE COMMUTATION ACT, 6 & 7 Wm. IV. c. 71. *See the* List of STATUTES.

TITHES,
are incorporeal hereditaments, 344
considered with advowsons, 345
a rent-charge substituted for, in kind; redemption of, *id.*
apportionment of, 347
merger of, in the land whence issuing, *id.*
burden of, presumed on sale of land, *id.*
title on sale of, *id.*, 348
registration of, under Land Transfer Act, 1875, 420

TITLE,
covenants for, 152, 153, 279, 280, 456—461
purchaser's investigation of vendor's, 280, 282, and n. (*u*), *Addm.*, 287, 453
assignee or grantee of leasehold, not to call for title to freehold, *id.*, 287
on sale of tithes, 347, 348
on sale of advowson, 348
by prescription, 353
to realty barred by lapse of time, 384
when extinguished by Statute of Limitations, 385

TITLE—*continued.*
of 40 years when sufficient, 280, 348, 392
evidence of, under Land Transfer Act, 1875, 400
estate of first registered proprietor with *absolute*, *id.*, 401
estate of first registered proprietor with *possessory*, 401
qualified, when may be registered, *id.*
doubtful questions arising as to, how settled under Land Transfer Act, 1875, 419
registration of, enactments as to, 420, 421
establishment of adverse, to land, 423

TITLE-DEEDS,
to what extent they partake of nature of realty, 14
pass with land to heir or devisee, *id.*
how regarded when owner deposits them as security, *id.*
most recent, should be at least 40 years old, 280
what, to be disclosed on registration under Land Transfer Act, 1875, 417
suppression of, 188, 424
production and safe custody of, 461—463
mortgagor's power to inspect, 177 n. (*t*), 466

TITLES OF NOBILITY,
are hereditaments, 7

TREASON. *See also* FORFEITURE.
forfeiture and escheat of lands, &c., for, now abolished, 23, 78

TREES. *See* TIMBER.
when realty and when personalty, 10
fruit and produce of chattels vegetable, 11

TRUSTEE,
owner of legal estate, 38, 39, 247, 268
not 'protector of settlement' as against *cestui que trust*, 74
of personalty settled on trusts similar to those of freeholds, 79
for sale, where realty not in strict settlement, 80
to secure portions, 161
to preserve contingent remainders, 218, 260
always hold by joint tenancy, 238
covenants by and with joint tenants, *id.*, 55 n. (*h*), 280
term 'bare trustee' investigated, 268 n. (*n*)
the Crown or a Corporation as, 267, 268
jurisdiction of equity over, 270
lunatic and infant, *id.*
Act of 1850, Extension Act, 1853, effect of, *id.*
Powers Act, 1869, 271
how affected by the Conveyancing Act, 1882, *id.*, 272
conviction of, will not cause forfeiture of estate, 273
will hold land discharged of trust where no inheritable blood, *id.*
can derive only one advantage from trust, *id.*
covenants by, to purchaser of lands, &c., 280
cannot sell, unless expressly empowered, or under order of Court, land without timber or minerals, and allow *cestui que trust* unimpeachable for waste to sell timber, 295

TRUSTEE – *continued.*
general devise by a, its effect, 337, 338
what estate taken by, under devise, 338 *et seq.*
presentation to a church devised to, 339
under an unlimited devise, *id.*
difference between an *express* and *constructive* under Statute of Limitations (1874), 379
express, will not be protected by any Statute of Limitations, as against *cestui que trust*, *id.*, 380
powers of, under Vendor and Purchaser's Act, 1874, 393
death of bare, seised in fee simple, caused estate to vest in his legal personal representative, 268, 393. 477, 475
married woman a bare, may convey like a *femz sole*, *id.*
notice to, under Settled Estates Act, 1877, 441
notice to, under Settled Land Act, 1882, 56, 527
powers of, under Settled Estates Act, 1877, 442
covenants on conveyance by, or mortgagee, 280, 460
appointment of new, 272, 475—478
protection of, adopting Conveyancing Act, 1881, 489
separate, 272, 501
disclaimer of powers by, 301, 501
application of money in hands of, under powers of settlement, 49 n. (*u*), 442, 524
where no, of settlement, Court may appoint, 525
protection, &c., of, under Settled Land Act, 1882, 526
re imbursement of, *id.*

TRUSTEES' RELIEF ACT, 22 & 23 Vict. c. 35. *See* the TABLE OF STATUTES.
TRUSTS, SEE RELIEF AND TRUSTS.
TURBARY,
right of, 6, 30, 344
See HEREDITAMENTS

UNCERTAINTY,
duration of tenure, how affects claim to emblements, 11
USE,
and occupation, action for, 148, 149 n. (*g*)
grant of easement by way of, 353, 487

USES AND TRUSTS, 88, 245
not known at common law, *id.*, 246, 247
rise of Equity, 246
rules of Equity now prevail, *id.*
legal and equitable estate still distinguished, 247
equitable estate or beneficial interest, *id.*
legal and equitable estates described, 248
USES, origin of term, *id.*
employed to avoid Statutes of Mortmain, *id.*
rights of *cestui que use*, 248 *et seq.*
to avoid the prohibition of testamentary disposition, 88, 249
to avoid attainder, *id.*
to avoid burthens of feudal servitude, *id.*
not subject of tenure, *id.*
could not be extended by *elegit*, 250

USES AND TRUSTS—*continued.*
USES, former position of beneficiary, *id.*
feoffee to, dying without heir, *id.*
king &c., and corporation could only be seised to their own, *id.*
how created '*Express*,' '*by implication*,' *id.*
'*constructive*' '*resulting*,' *id.*, 251
equity following, and not following the law, 251, 260
descent of, 251
'shifting,' or 'springing,' *id.*, 262
original inconveniences resulting from, 252
partial remedies, *id.*
Statute of Uses, 88, 89, 245 *et seq.*
See USES, Statute of.
no use upon a use, 257, 258
TRUSTS, origin of, 259
to what purposes uses and trusts formerly applied, *id.*
construction of, 260, 261
to preserve contingent remainders, 260 *et seq.*
might have been created by oral direction before Statute of Frauds, 264
creation and assignment of, *id.*
transfer of equitable estate, *id.*, 265
liability of estate in, for debt, 265
estates in, subject to Crown debts, *id.*
how at present day distinguished from Uses, 266
'*active*'—'*passive*,' '*executed*'—'*executory*,' '*declared*'—'*implied*,' *id.*, 267
The Crown or a corporation may now be trustees, *id.*, 263
alienation and devolution of equitable estate, 268, 269
term 'bare trustee' investigated, 268 n. (*n*)
actual and *constructive* notice of, 269
breach of, after notice of prior sale of land, *id.*, 270
no forfeiture of estate by reason of trustee's conviction, 273

USES (IMMEMORIAL),
will confer prescriptive title to incorporeal hereditaments, 351

USES, STATUTE OF, and *see* the TABLE OF STATUTES.
its operation, 88, 89
law prior to, 245
gradual progress towards the Statute of Uses, 27 H. VIII., 252
object of, 253, and n. (*b*)
its First Section set out, *id.*, 254
effect of on "a feoffment to A. to the use of B.," *id.*
construction of, *id.*
applies only to *realty*, *id.*
applies only to the benefit of a third person, 255
why conveyance purports to be 'unto and to the use of' a grantee, *id.*
conveyance by a man to the use of himself, *id.*
Conveyancing Act, 1881, as to, 256
must be co-extensive with feoffee's estate, *id.*
scintilla juris, *id.*, 257
object of, defeated, 257
result of the, 258

USES, STATUTE OF—*continued.*
conveyances under, 276, 283, 285, 286, 287
powers generally take effect by virtue of, 297
powers not operating under, *id.*, 298
what powers operate under, enumerated, 299
its effect upon devises, 289 n. (*bb*), 319
effect of, in respect of easements, &c., 353
property operated on by, must be *in esse*, *id.*
mere rights cannot be conveyed by, *id.*
rent-charges created under, 360

VENDOR,
covenants of fiduciary, of land to purchaser, 280
title of, of land, how investigated, *id.*, 392, 393, 453. *See* TITLE.
or purchaser of realty or leaseholds may obtain decision of judge at Chambers in England or Ireland as to requisitions, objections, &c., 394

VENDORS AND PURCHASERS OF, REAL PROPERTY, ACT AS TO, 37 & 38 Vict. c. 78. Set out in Appendix, 392—394. *See* TABLE OF STATUTES.

VILLEINS, VILLENAGE, 26, 29, 30
pure and socage, 29, 30
formerly bound to soil, 31

'VOUCHEE,' 68

WASTE, 47—53
voluntary and permissive, 47—49, 244
action of devisee in fee against executor of devisee for life for, 49, 50
action for, before Statutes of Marlbridge and of Gloucester, 50
'without impeachment of,' 50, 51, 53
common law right of action against tenant for life now survives against his executor, 51
remedy for, *id.*
equitable, 52 *et seq.*
'good husbandry,' meaning of, 52
tenant in tail may commit, 76
in leaseholds, 143, 148
remedy for, by one tenant in common against another, 243
remedy for, by coparceners *inter se*, *id.*, 244
must be *voluntary* to give remedy for, as between joint tenants or tenants in common, 244

WASTE LANDS, origin of, 30

WATER,
included in 'Land,' 5
gift of, without land, confers only fishing rights, *id.*
definition of legal term, *id.*
nature of property in, a temporary usufruct, *id.*
right to a flow of, an incorporeal hereditament, 7
right of fishing in a particular, an incorporeal hereditament, 7, 351

ATERWORKS,
shares in Chelsea, held to be personalty, 15

WAY, RIGHT OF,
an incorporeal hereditament, 7, 350

WIDOW,
re-marrying, when determines her dower, 39
estate granted to, *durante viduate*, *id.*
quam diu se bene gesserit, *id.* and n. (*b*)

WILL,
land not generally devisable by, until 32 H. VIII., 28, 29, 249, 319
conveyance to use of, before Hen. VIII., *id.*
land held in burgage always devisable by custom, 29
customary, of lands in gavelkind before 32 H. VIII., *id.*
effect of tenant in fee dying without, and without heir, 35
gift of realty by, contrasted with gift by deed, 41, 42, 83
of lands, how affected by Settled Land Act, 1882, 55, 295
words in, which create an entail, 63, 64
distinction between, and *testament*, 88 n. (*h*), 318
of land under Statute of Wills, 89, 320
under Statute of Frauds, *id.*, 321
under Wills Act, 1837, 89, 320—342
of person under twenty-one, void, 112, 321, 323
of mortgagor, 186—188
whether devise by, vested or contingent, 219, 220
executory devise by, 221. *See* that Title.
general power of appointment exercised by, 310, 322, 324, 326
containing general devise, includes estates over which testator had a general power of appointment, 311, *id.*
execution of powers by, 312, *et seq.*
how differing from instrument *inter vivos*, 318
testator, *testament*, *devise*, *bequest*, and *codicil* defined, *id.*, 88 n. (*h*), 319
history of, 319 *et seq.*
formalities of EXECUTING, 320
witnesses to, *id.*
executed by testator, but containing something not his will, *id.*, n. (*o*)
what may be disposed of by, *id.*
who can or cannot make, *id.*, 322
of married woman, 115, 322 *et seq.*
since Married Women's Property Act, 1882, 116, 324
gift by, to a corporation, *id.*
LAPSE of gift in, *id.*
exceptions to rule as to lapse of gift in, *id.*, 325
gift by, to A. 'and his heirs' will not prevent its lapse, 325
lapse of gift in, viewed in connection with powers, 326
lapse gift of realty in—if there be no residuary devisee—goes to heir, *id.*
speaks from death of testator, *id.*
residuary devise in, of realty is specific, *id.*, 327
REVOCATION of, 310 n. (*z*), 327 *et seq.*, 330
loss or *destruction* of, 328
obliterations, *interlineations*, *alterations*, in, *id.* 329
revival of, *id.*
of realty requires no executor, 330
charge of debts and legacies, *id.*, 331, 332

WILL—*continued.*
implied charge of debts and legacies, 331
proper mode of framing clause in, as to charges of debts, &c., 333
remedy where no express charge for payment of debts in, 334
PROBATE of, affecting realty, 334—337
general, of realty, now includes all estates other than of freehold, 337
of trustee or mortgagee, *id.*, 199, 268
trusts of an estate left by, executed by devisee, 338
effect of leaving trust estate by, 338
effect of, not expressly defining estate of trustee, 339
construction of—words of *limitation*, 340
without words of limitation, *id.*
words in, importing a failure of issue, *id.*, 223, 341
past and present effect of an indefinite devise in, 341
effect of not registering a, devising land in Middlesex or Yorkshire, 394
includes codicil, 318, 319, 452, 510
clause in, limiting statutory powers of life tenant under Settled Land Act, 1882, is void, 59, 530

WILL, ESTATE AT, 139 *et seq.*

WILLS ACT, 1837, 1 Vict. c. 26. *See* the TABLE OF STATUTES.

WILLS, STATUTE OF, 32 Hen. VIII. c. 1. *See* the TABLE OF STATUTES.

WORDS, 6 n. (*z*)
of inheritance, &c., 41, 42, 82
of limitation, *id.*, 82
'to A. and his issue' in a *deed* create a life estate, 63
'to A. and his offspring' ,, ,, ,, *id.*
'to A. and his seed' ,, ,, ,, *id.*
secus where same words occur in a will, 64
'to A. for ever,' or 'to A., and his assigns for ever,' in deed create life estate, 82
secus where same words occur in will, unless a contrary intention is clear, *id.*
'in fee simple,' in deed, convey fee without 'heirs,' 83, 234, 242, 278
'in tail' sufficient to limit estate without 'heirs of the body,' 64, 242, 278
'months,' generally lunar, 140 n. (*l*)
'person' includes 'corporation,' *id.*
of limitation in a *devise*, 340
importing a failure of issue, *id.*, 223
'die without issue,' *id.*
'die without leaving issue,' *id.*
'have no issue,' *id.*
'general' in conveyance, 358, 455, 456
of limitation in a deed, 484

'WRITING,'
what term includes, 452

YEARLY TENANCY, 140 *et seq.*

BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

BY THE SAME AUTHOR.

RAILWAY PASSENGERS AND RAILWAY COMPANIES: THEIR DUTIES, RIGHTS, AND LIABILITIES. By L. A. GOODEVE, Barrister-at-Law. With an Appendix of Cases and Statutes to November, 1880. *5s. 6d.*

"Mr. Goodeve has rendered a service to the public in making a digest of the law relating to railway passengers, including the respective duties, rights, and liabilities of the Companies on the one hand and passengers on the other, as laid down by the statutes and the decisions of the Superior Courts. The various points are treated in a clear, yet concise, manner; and it is to be hoped that this little work will be widely studied, so that people may know what are their rights, and take steps to maintain them."—*Saturday Review.*

"The Author has managed to pack into a very small space much useful information on a somewhat extensive branch of law."—*Athenæum.*

"Mr. Goodeve's little book is a concise epitome of the Acts, Byelaws, and Cases relating to passengers and their personal luggage. It is clearly written, and the reader is able speedily enough to find any point upon which he desires to inform himself."—*Law Journal.*

"After reading the volume with great interest, we can only say that it is clear, compact, and accurate. Passengers who want *reliable* information should consult this book."—*Sheffield Post.*

THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND APPLIED TO INDIA. New Edition by L. A. GOODEVE, Barrister-at-Law. With Supplement containing the Indian Evidence Act, 1872, and other Acts relating to the Law of Evidence in India. 21*s.*

"Recommended by the Civil Service Commissioners to be carefully read by selected candidates for the Indian Civil Service."—*General Instructions for Examinations.*

*** *THE SUPPLEMENT can be had separately.*

LORD MANSFIELD, C. J.: A FOUNDER'S DAY SPEECH. By L. A. GOODEVE, B.A., Junior Student of Christ Church, Oxford, and of the Middle Temple, Barrister-at-Law. 1865. 1*s.*

"In Mr. Goodeve's speech we have a concise estimate of Lord Mansfield's political as well as of his judicial character, written in a singularly agreeable style. The whole of Mr. Goodeve's oration is conceived in good taste, and is free from the exaggerated phraseology often found in similar productions."—*Solicitors' Journal.*

DL AGL QHg
The modern law of real propert
Stanford Law Library
3 6105 044 254 238